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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 32

CHRISTIAN F. BRAEN, PETITIONER,

vs.

PFEIFER OIL TRANSPORTATION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1959
CERTIORARI GRANTED MARCH 30, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 706

CHRISTIAN F. BRAEN, PETITIONER,

vs.

PFEIFER OIL TRANSPORTATION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A]

IN UNITED COURT OF APPEALS FOR THE SECOND CIRCUIT

CHRISTIAN F. BRAEN, Plaintiff-Appellee,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,
Defendant-Appellant.

Appellant's Appendix—Filed May 14, 1958

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

DOCKET ENTRIES

13929 Docket Cal. No. 1590

CHRISTIAN F. BRAEN,

vs.

PFEIFER OIL TRANSPORTATION CO. INC.

Attorney for Plaintiff:
BERNARD ROLNICK,
320 Broadway, N. Y. C. 7.

Attorneys for Defendant:
PURDY, LAMB & CATOGGIO,
80 Broad St., N. Y. C. 4.

BASIS OF ACTION:
Tort Negligence—Damages for Personal Injuries—Marine-Jones Act.
Seeks—$110,000.00

JURY TRIAL CLAIMED: √

13929

Christian F. Braen vs. Preifer Oil Transportation Co. Inc.

Date	Filings—Proceedings
11- 4-53	Complaint Filed—Summons Issued
11- 9-53	Summons ret'd & filed—served on Deft.
12-10-53	Answer Filed
12-15-53	Note of Issue Filed
5-19-55	Rayfiel, J. Pretrial adjd. to June Term
[fol. 2]	
6- 3-55	Notice of Objections to Interrogatories etc. Filed 6-15-55
6-14-55	Rayfiel, J. No answer pre trial adjd. 6/21
6-15-55	Byers, J. Hearing on objections to interrogatories Adjd. to June-22-1955
6-22-55	Byers, J. Hearing on objections to interrog.—Adjd. to 6-29-55
6-24-55	Rayfiel, J. Pre trial adjd. Oct.
6-29-55	Byers, J. Hearing on objections to interrog.—Adjd. to 7-20-55
7-20-55	Inch, J. Hearing on objections to interrog.—Adjd. to 8-24-55
8-10-55	Notice of motion filed for summary judgt. etc. (8-24-55)
8-24-55	Abruzzo, J. Motion filed for summary judgt. adj. to 9-14-55
9-14-55	Rayfiel, J. Motions on objection to interrogatories and to dismiss complaint adjd. to Oct. 5-55
10- 5-55	Inch, J. Hearing on objections granted as indicated. Settle order on notice.
	Inch, J. Motion for summary judgt. argued—decision reserved.
	Affidavit of Thomas J. Irving filed.
	Affidavit of Christian F. Braen filed.

10- 5-55 Inch, J. Decision rendered on motion for summary judgment. Motion denied—Settle order (see memo)

10-26-55 By Inch, J. Order Filed Denying Motion For Summary Judg't

[fol. 3]

5-25-56 Answer to Interrogatories Filed

11- 8-56 Before Abruzzo, J. Case adjd. to Nov. 14-56

11-14-56 Before Abruzzo, J. Case adjd. to Nov. 21-56 11.30 AM

11-21-56 Before Abruzzo, J. Case Called—R & P.

11- 4-57 Rayfiel, J. Case Called—R. S.

12- 2-57 Bruchhausen, J. Case Called—R & P.

12-16-57 Bruchhausen, J. Case Called—Trial Ordered & adjd. to 12/17/57

12-17-57 Bruchhausen, J. Case Called—Trial resumed & adjd. to 12/18/57

12-18-57 Bruchhausen, J. Case Called—Trial resumed & Concluded. Jury returned verdict in favor of the Plaintiff in the sum of $38,000.00 and the Court Ordered Judgment accordingly.
Judgment Filed
Order of Sustenance Filed

12-24-57 Transcript of record filed

12-27-57 Notice of Motion Filed to Set Aside Judgment etc. 12-31-57

12-31-57 Bruchhausen, J. Motion submitted.

1- 3-58 Bill of Costs Filed: Costs Taxed and Docketed against Deft. in the sum of $41.40.

1-16-58 By Bruchhausen, J. Decision on Motion to Set Aside Judgt. Motion Denied—See Memo.

2-13-58 Notice of Appeal & bond filed.
Copy of notice of appeal to Atty. for Pltff.

4-15-58 Request to charge filed.

[fol. 4]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Judgment Civil No. 13929

CHRISTIAN F. BRAEN, Plaintiff,

vs.

PFEIFER OIL TRANSPORTATION CO., INC., Defendant.

JUDGMENT—December 18, 1957

The Jury empanelled in the above entitled action having rendered a verdict in favor of the plaintiff in the sum of $38,000.00

It is accordingly adjudged that judgment be and is hereby entered for said sum and that judgment be docketed accordingly and that the Bill of Costs when taxed be docketed.

Dated: Brooklyn, New York.
December 18, 1957

Sidney R. Feuer, Clerk.
By Charles J. Playne, Deputy Clerk.

[fol. 5]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury, now that the presentation of evidence in this action has been completed, it is the function of the Court to instruct you on the law.

You are the sole judges of the facts in the case.

Statements made by counsel in support of their objections, in summations, or otherwise, are not proof, although they may be helpful to you in ascertaining the truth. Your

recollection of the testimony, however, is what you should take into consideration in arriving at your verdict.

The Court made rulings in the course of the trial in admitting or excluding evidence, or otherwise. You are obligated to accept those rulings on the law, and the instructions as given in this charge.

The evidence, as distinguished from the law, is within your province to consider.

None of the rulings made by the Court or statements made by it are to be regarded by you as an indication of the Court's opinion on the issues of fact.

The plaintiff in this action is Christian F. Braen. The defendant is Pfeifer Oil Transportation Company, Inc.

There are some matters that seem not to be in dispute, namely, that the plaintiff was in the employ of the defendant; that the accident occurred on January 22nd, 1953, on a barge known as the Winesook, which was owned by the defendant Pfeifer Company, as was the Pfeifer II, upon which the plaintiff had worked as a member of the crew prior to the time of the accident.

While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that at the time of the accident he was a member of the crew.

Whether or not at the time of the accident he was engaged in functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine.

[fol. 6] So that we now come to a consideration as to whether or not the plaintiff has established his claim as a seaman and injuries in accordance with the provisions of the Jones Act and that act is that one of the elements of sustaining a claim is that he must show that the defendant was negligent in whole or in part, and I emphasize that in whole or in part because if there is any negligence on the part of the defendant, why, then there must be a recovery by the plaintiff.

Now, on the question of negligence, the defendant is obligated to furnish the plaintiff with a reasonably safe place in which to work, namely, such a place as would be

furnished by a reasonably prudent person under the circumstances.

This is a continuing duty and obligation and non-delegable. An employee such as the plaintiff does not assume the risks of his employment if the jury determines as a fact that the plaintiff's injuries resulted in whole or in part from the negligence of the defendant.

Now, the claim of negligence is that a certain catwalk and some of the apparatus in connection with it was defective or in poor condition.

One of the elements in order to sustain the plaintiff's claim on negligence is either to show that the defendants were actually notified of this condition within a reasonable time, or that they should, by its existence, if it had existed for a reasonable length of time in advance of the accident, should have been informed of that condition by a reasonable inspection and reasonable considerations of the matter.

If the plaintiff's accident was wholly his own fault, without any negligence on the part of the defendant, of course, he may not recover.

If you find that the plaintiff's negligence contributed to the accident, you should reduce his recovery by such percentage of contributory negligence as you find existed.

I shall mention that item in detail later.

[fol. 7] The burden or obligation is upon the plaintiff to persuade you by a fair preponderance of evidence as to the truth of his claims. Preponderance of evidence does not necessarily mean the greater number of witnesses, but it means the quality of the testimony of the witnesses and of the other evidence.

The defendant has no duty to disprove any of the plaintiff's claims.

If you find as to any of the plaintiff's claims that the evidence is evenly balanced, then you must find for the defendant on such claim.

If you find that the plaintiff sustained personal injuries by reason of the negligence in whole or in part of the defendant and that such negligence was the proximate cause of the accident, then you may determine the amount of such damages.

The fact that I now charge you on that subject does not mean that I have formed an opinion as to whether there was negligence, but I am obliged to fully charge you on all matters bearing on this case.

The amount of damages asked for by the plaintiff or mentioned in his complaint or in comment to you is not evidence in this case.

In fixing the amount of damages you may take into consideration the compensation or loss of earnings, pain and suffering up to the present time, and if you determine that the injuries will continue or be permanent, damages for loss of earnings and pain and suffering during such period of time as you find they will continue. You may consider in that connection any loss of earnings by reason of any change in employment due to the nature of the injury, or which may have prevented him from advancement from one position to another which might have been more remunerative.

If you find that the injuries are permanent you may take into consideration the life expectancy table but you are not bound to do so.

[fol. 8] The plaintiff's life expectancy is 18.79 years.

If you find that the defendant was negligent but also find that the negligence of the plaintiff contributed to the accident, such contributory negligence of the plaintiff does not bar any recovery by him. The burden of proving such contributory negligence of the plaintiff is upon the defendant.

You must determine the proportion or percentage of such contributory negligence, if any, and you must then diminish or reduce the plaintiff's damages in proportion to the amount of negligence attributable by you to the plaintiff.

Sympathy should not enter into your deliberation and should have no part therein. Both parties stand equal before the Court and are entitled to even-handed justice. The fact that the plaintiff is an individual while the defendant is a corporation should in no wise influence your judgment.

The quality of the testimony of the particular witnesses, regardless of who calls them, rather than the quantity or the number of witnesses is the test to be used in arriving

at your decision. There is no presumption that the witnesses for the plaintiff are more or less truthful or credible than the witnesses for the defendant.

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining this you are entitled to take into consideration their bias, if any, their relationship to the parties, their interest in the outcome of the case, if any interest exists, their manner of testifying, their candor and frankness and any other test which you would ordinarily use in judging the weight to be given to the statements of persons with whom you come in contact.

It is for you, and you alone, to decide which testimony you shall accept.

If you find that any witnesses wilfully testified falsely to a material fact in the case, you may disregard his testi- [fol. 9] mony altogether, but you are not bound to do so and you may accept such testimony as you believe to be true and reject such testimony as you believe to be false.

While it is essential that your verdict should represent the opinion of each individual juror, it by no means follows that individual opinions may not be changed by conference in the jury room. The object of the jury system is to secure by comparison of views and by argument one concerted opinion, provided that it can be done reasonably and consistently with the individual convictions of each juror. Each juror should listen, with a disposition toward being convinced, to the opinions and arguments of the others. It is not intended that each juror should go into the jury room with a fixed opinion that cannot be shaken.

There can be no verdict of the jury, either for the plaintiff or for the defendant, unless such a verdict is unanimous.

If you agree upon a verdict, such a verdict should be either for the plaintiff for the amount of his damages expressed in dollars or for the defendant.

Finally, if you desire to examine any of the exhibits, they will be delivered to you, when requested.

Are there any exceptions to the charge and additional requests to charge?

Mr. Kilroe: There are no exceptions or requests, your Honor.

Mr. Lamb: May I come up?
The Court: Yes.

(Out of the hearing of the jury:)

The Court: Any exceptions by the defendant?

Mr. Lamb: I would like to except to that portion of your Honor's charge where you said that it is not seriously disputed that at the time of the accident he was a member of the crew of the barge Pfeifer II, and I would like to except to that portion of your Honor's charge immediately following that, in that you failed to give to the jury any norm or test for determining whether or not the plaintiff would be entitled to recover under the Jones Act, as a [fol. 10] seaman member of a crew. I also would like to except to your Honor's failure to charge any of the requests which I submitted to your Honor.

I don't believe you charged any of my requests, your Honor.

The Court: I thought I did.

Mr. Lamb: I could not distinguish them in the charge, your Honor, and therefore I should like to take exception to your failure to charge my requests No. 1, No. 2, No. 3 and No. 4.

The Court: I decline to charge except as I have charged.

Mr. Lamb: In view of that rule that they have been announcing at the Circuit Court, I do feel that you didn't give the jury here any means of determining how they could tell how this man was or whether this man was a member of the crew.

The Court: I thought I stated there was evidence here as to what he had been doing as a member of the crew from which they could gather whether he was functioning as a member of the crew.

Mr. Lamb: Your Honor didn't tell them anything with respect to whether or not what he might previously have been doing as a member of the crew, what relation that would be to the examination as to whether the work he was doing at the time—

The Court: I just can't understand that.

It would seem to me from what I understand the rule to be that the character of the work that the crew man does

prior to the accident is pretty good evidence of what his duties are as a seaman and a definition of his work.

Mr. Kilroe: And whether he is a member of that crew.

The Court: And whether he is a member of the crew, of course.

Mr. Lamb: I don't want to get into a discussion with you. I want to make it clear that I take it that your Honor is not charging that the work that the man was doing at [fol. 11] the time, the character and nature of the work is a determining factor.

You are not charging that?

The Court: I won't charge excepting as I have charged.

Mr. Lamb: Then I would like to take an exception.

The Court: All right.

(The following was before the jury:)

The Court: I just want to make one amendment to my statement to you, ladies and gentlemen.

I did state that it is not seriously disputed that the plaintiff was not a member of the crew. Apparently according to the defendant's statement, he says that is a serious issue.

So I will leave that as an issue.

It is my duty to discharge the alternates who have served a useful function here.

The Clerk will now swear the marshals.

(The marshals were sworn.)

The Court: All right. I direct you jurors now to be taken to luncheon, and return after a reasonable time for deliberations of this case.

(The jury was then excused, at one o'clock P. M.)

[fol. 12]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title omitted]

DEFENDANT'S REQUESTS TO CHARGE

Defendant respectfully requests the Court to charge the jury as follows:

1. The mere fact that the plaintiff had been a seaman and member of the crew of the barge PFEIFER #2 prior to

his injury does not entitle him to maintain this action against his employer.

2. It is the nature and character of the work being performed by the plaintiff at the time his injury was sustained which determines whether he has the right to maintain this law suit.

3. If you find that the work which the plaintiff was performing at the time he sustained his injury was not in connection with the furtherance of the navigation of the PFEIFER #2, your verdict must be for the defendant.

4. The evidence shows that at the time plaintiff sustained his injury he was in furtherance of the work of completing the laying of a deck on a raft. Unless you find that this work was being done by the plaintiff as a member of the crew of the PFEIFER #2 expressly for the purpose of furthering the repair of the PFEIFER #2 in order to enable it to continue in navigation, your verdict must be for the defendant.

Purdy, Lamb & Catoggio, Attorneys for Defendants.

[fol. 13]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR JUDGMENT OR FOR NEW TRIAL—
December 23, 1957

Sirs:

Please Take Notice that defendant, Pfeifer Oil Transportation Company does hereby move pursuant to Rule 50(b) of the Rules of Civil Procedure to have the verdict in favor of the plaintiff against the defendant, Pfeifer Oil Transportation Company in the amount of $38,000.00 and any judgment which may have been entered thereon, set aside and for judgment in favor of defendant, Pfeifer Oil Transportation Company and against the plaintiff in accordance with the motions for a directed verdict made by

the defendant, Pfeifer Oil Transportation Company at the close of all the evidence upon the trial of this action.

Please Take Further Notice that the defendant, Pfeifer Oil Transportation Company does also move in the alternative, pursuant to Rule 50(b) and Rule 59 of the Rules of Civil Procedure, for a new trial upon the ground that the verdict of the jury was contrary to the law, contrary to the evidence, is excessive, and upon the ground that the case was erroneously submitted to the jury without proper instructions as to whether plaintiff was a member [fol. 14] of the crew of the barge PFEIFER #2 at the time of the accident.

Please Take Further Notice that the undersigned will bring the above motions on for hearing before this Court at the Courtroom thereof for the hearing of motions on the 31st day of December, 1957 at 10:00 A. M. in the forenoon or as soon thereafter as counsel can be heard.

Dated: New York, New York
December 23rd, 1957.

Purdy, Lamb & Catoggio, Attorneys for Defendant,
By Vincent A. Catoggio, Office and P. O. Address,
80 Broad Street, New York 4, New York.

To:

Bernard Rolnick, Esq., Attorney for Plaintiff, 320 Broadway, New York, New York.

[fol. 15]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT—Filed November 4, 1953

Action under special rule for seamen to sue without security and pre-payment of fees for the enforcement of Laws of the United States for the protection of Health and Safety at Sea

Plaintiff complaining of the defendant, by his attorney, Bernard Rolnick, Esq., respectfully shows to this Court and alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

First: Upon information and belief, that at all times hereinafter mentioned, the defendant was and still is a corporation organized and existing under the laws of the State of New York, or is duly licensed to do business in the State of New York, and maintains an office for the transaction of business within the jurisdiction of this Honorable Court.

Second: That upon information and belief, at all times hereinafter mentioned, the defendant owned, operated, controlled and managed a certain vessel known as the Barge PFEIFER No. 2, a vessel of American registry, flying the American flag.

Third: That the plaintiff was employed by the defendant on board said vessel, in or about the month of August, 1952, in the capacity of Barge Captain, at an agreed monthly rate of wages.

[fol. 16] Fourth: That on or about the 22nd day of January, 1953, while said vessel was tied up to a pier owned by the defendant herein, at Staten Island, N. Y., and while plaintiff was duly performing his duties on board said vessel in a careful, proper and prudent manner, and solely by reason of the negligence of the defendant and officers and fellow seamen of the plaintiff, and the unseaworthy condition of said vessel, plaintiff was caused to suffer injuries and damages as hereinafter set forth.

Fifth: That plaintiff's injuries and damages were not caused by neglect or want of care on his part, but solely and wholly by reason of the carelessness and negligence of the defendant and officers and fellow seamen of the plaintiff, and by reason of the unseaworthy condition of said vessel and its equipment.

Sixth: That plaintiff's injuries and damages were caused by reason of the negligence and carelessness of defendant and the negligence of the officers and fellow seamen of the plaintiff and the unseaworthy condition of said vessel and its equipment and the defendant failed to provide the plaintiff with a safe, secure and proper place in which to perform his work and with proper and suitable materials, tools and appliances with which to perform his

work; and the defendant permitted the said vessel to become and remain in an unseaworthy and dangerous condition and failed to place safeguards in and about the vessel so as to conserve the life and limb of the members of the crew working in and around the said vessel and failed to take proper precautions to protect the plaintiff from suffering severe injuries and damage when he was caused to fall from a barge owned and operated by the defendant herein, while he was in the performance of his work in the aforesaid capacity of Barge Captain, as the result of negligence and the unseaworthy condition of said vessel; that on the aforesaid date while the plaintiff was so employed, the defen- [fol. 17] dant failed to properly protect the plaintiff from suffering said damages and injuries, and failed to comply with the General Admiralty Law and statutes of the United States Government and steamship rules regulating the relationship of the parties hereto and the duties owing to the plaintiff by defendant as a result of all of which plaintiff herein sustained injuries and damages hereinafter complained of.

Seventh: That by reason of the premises plaintiff suffered injuries to his head, face, body and limbs and became sick, sore, lame and disabled, all as the result of the negligence of the defendant and the negligence of the officers and fellow seamen of the plaintiff and the unseaworthy condition of the said vessel and its equipment and that as a result thereof, plaintiff was confined to a hospital where he received medical care and treatment and plaintiff has been unable to attend to his usual duties as a result of said injuries and upon information and belief, will never in the future be able to perform his work in the same manner as prior to said accident; that plaintiff's earning power will be greatly diminished thereby; that the plaintiff suffered and will continue to suffer great pain and agony from his injuries and upon information and belief, plaintiff has been permanently injured and damaged.

Eighth: That at all times hereinafter mentioned, there was and still is in full force and effect, an act of Congress binding upon the parties hereto, known as the United States Merchant Marine Act of 1920, Section 33, Act of June 5, 1920, Chap. 250, 41 Stat. at Large 1007, Title 46, U. S. C. A.

Section 688, commonly known as the "Jones Act", by virtue of which this Honorable Court has jurisdiction over the parties and the subject matter of this action.

Ninth: That by reason of the premises, plaintiff has suffered damages in the sum of One Hundred Thousand ($100,000.00) Dollars.

[fol. 18] AS AND FOR A SECOND CAUSE OF ACTION

Tenth: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "First" to "Eighth", both inclusive, with the same force and effect as if herein fully set forth at length.

Eleventh: That upon information and belief, plaintiff having become injured and ill as aforesaid, it was the duty of the defendant herein to furnish the plaintiff with prompt medical care, attention and medicines and to pay for the expenses of the plaintiff's maintenance and cure, and to pay him wages to the end of the voyage and for a time thereafter, for all of which the defendant is obligated by General Maritime Law.

Twelfth: That the defendant has failed, neglected and refused to pay to the plaintiff all of the wages, maintenance and cure hereinabove referred to in paragraph "Eleventh", while the plaintiff has been incapacitated, and upon information and belief, that the plaintiff has been and will be incapacitated for a long period of time, and as a result thereof, the sum which the defendant is obligated to pay to the plaintiff therefor, upon information and belief amounts to Ten Thousand ($10,000.00) Dollars, no part of which has been paid although duly demanded.

Wherefore, plaintiff demands judgment against the defendant for the sum of One Hundred Thousand ($100,000.00) Dollars on his first cause of action and Ten Thousand ($10,000.00) Dollars on his second cause of action, making in all the total sum of One Hundred Ten Thousand ($110,000.00) Dollars together with the costs and disbursements of this action.

Bernard Rolnick, Esq., Attorney for Plaintiff, Office & P. O. Address, 320 Broadway, Borough of Manhattan, City of New York.

[fol. 19]

IN UNITED STATES DISTRICT COURT

Excerpts From Transcript of Trial

* * * * * * *

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Lamb: If the Court please, during the picking of the jury, counsel for the plaintiffs made the comment that there was a basis, another basis, is the way he put it, of recovery; namely, the unseaworthiness of the barge Winisook.

I ask your Honor at this time to exclude any reference to unseaworthiness of the barge Winisook as the basis for recovery in this case for the reason, one, it is not pleaded, and for the second reason, and the principal reason, that this is not a diversity case, and there is no jurisdiction of this court at common law, civil jury, for a determination of a right of recovery on the basis of the maritime or admiralty doctrine of unseaworthiness, as such, without regard to negligence.

The Court: First, it has not been pleaded. What about that, Mr. Kilroe?

Mr. Kilroe: Well, Paragraph 5, general allegation of unseaworthiness, and Paragraph 6.

The Court: He mentions unseaworthiness.

Mr. Lamb: I take that to refer to the barge, Pfeifer No. 2.

The Court: The ship that you are mentioning is the second ship?

Mr. Lamb: That is right.

Counsel made reference to the Winisook, whereas he pleads as to the Pfeifer No. 2.

I take it the unseaworthiness in the complaint was related to Pfeifer No. 2 upon which it is claimed that the man was employed and a member of the crew, not some third independent vessel.

Mr. Kilroe: That is not so. This plea is brought to refer to both vessels. One of our contentions is that at the time of the accident, although he was injured on the

Winisook and was injured, he was still a member of the crew of the Pfeifer No. 2.

[fol. 20] The Court: Well, taking Paragraph 5 and the verbiage about unseaworthiness, you say, by reason of the unseaworthiness, unseaworthiness—or rather, unseaworthy condition of the vessel, and you are speaking, as I gathered, of the Pfeifer No. 2. You don't say of said vessels.

Mr. Kilroe: Well, it was conceded from the beginning, I think, this is an unlimited, rather a very strict interpretation and there was no doubt at any time that this man was injured on the Winisook.

The claim here is, and our first contention is, that when he was injured on the Winisook he was still a member of the crew of the Pfeifer No. 2. At no time in this litigation, the motions that took place here for summary judgment, was it ever contended that this man was not injured on the Winisook or was injured on the Pfeifer No. 2; so this refers to the vessel involved in the accident.

Mr. Lamb: That is my very point, your Honor, that the contention has been that the man, although injured on the Winisook was injured as a member of the crew of the Pfeifer No. 2.

In other words, he had temporarily been on the Winisook. There is or has never been any pleading here, there has never been any contention here that independently of the right of action which the plaintiff asserts under the Jones Act, as a member of the crew of the Pfeifer No. 2 against his employer that he is asserting any right of action based upon an unseaworthy condition of some third independent vessel with which the man has not been connected.

Mr. Kilroe: Absolutely, that contention has been from the beginning.

The Court: You had a motion, as I gather, for summary judgment?

Mr. Kilroe: That is right.

The Court: Was there anything in those papers?

Mr. Kilroe: Yes, sir; it says he was injured on the Winisook and he was performing a duty on the Winisook on a [fol. 21] raft, and may I point out something else, your Honor, aside from all this; our second contention is, no matter what they call him, a carpenter, engineer or a baker, or a

cook, he was on the Winisook, and whether you call him a seaman or not, under the doctrine of the Hawn case, he is entitled to recover, if there was an unseaworthy condition of the vessel; that he had to pass through there to perform his work.

Mr. Lamb: That is actually in a third-party action, under the Hawn case.

The Court: Where is the Hawn case?

Mr. Kilroe: I cited it in there.

The point is this, your Honor, that a carpenter or anyone else who is on one vessel performing any services in the same position as a longshoreman and comes under the same classification as a seamon.

The Court: Well, I will deny the motion at this time; but reserve the right to you, Mr. Lamb, to make appropriate motions later on in the case.

* * * * * * *

CHRISTIAN F. BRAEN, the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

Q. Mr. Braen, you are the plaintiff in this action?

A. Yes, sir.

Q. How old are you?

A. 53.

Q. And what was the date of your birth?

A. January 22, 1904.

Q. Now, prior to January the 22nd, 1953, you were employed by the Pfeifer Oil Transportation Company, the defendant in this case. is that correct?

A. Yes, sir.

Q. And you had been a mate on one of their vessels; is that correct?

A. Yes, sir.

[fol. 22] Q. Now, what was the name of that vessel?

A. Pfeifer No. 2.

Q. And how long had you been a mate of the Pfeifer No. 2 before your accident?

A. Some time in the late fall, around September. Around September, I would say.

Q. Now, prior to that time, had you gone to sea in different capacities, Mr. Braen?

A. Yes, sir.

Q. And at the time of your accident, did you hold any papers from the Coast Guard?

A. Yes, sir.

Q. What papers did you hold?

A. I hold the ratings of Chief Cook, Chief Steward and also as Barge, Tanker man's Certificate.

Q. Then I take it that this tanker man's certificate has to do with handling oil lines, is that right?

A. Yes, sir.

Q. Now, what were your duties on the Pfeifer No. 2?

A. My duties were many. We handled all the lines at all times, both in making to a dock, leaving a dock, attaching the tug to the vessel; it was non-propelled, non-self-propelled, leaving the tug go, and we loaded and unloaded the cargo.

We handled the hose for the loading and unloading of the cargo, which we referred to as the cargo hose; and we prepared our own food. We put up our navigation lights when necessary, done the maintenance of the barge, painting, chipping, scraping, things like that; and minor repairs, repairs that we could handle between the two men aboard the barge.

Q. Now, the crew of the Pfeifer No. 2 consisted of how many men?

A. Three men.

Q. Did these three men remain on the barge at all times?

A. Not all three of them.

Q. What was the procedure, the method of work?

A. Well, we worked by contract with our union on an eight-hour day. In order to get time off, two men would work 12 hours a day. We would share the twenty-four hours between the two men.

One man would always be off. We worked two weeks on and one week off.

[fol. 23] Q. While you were off did you get paid anything for that time?

A. Yes, sir.

Q. What did you get paid during that time?

A. We received a bonus, monthly bonus for the handling of this cargo hose I referred to. We also received a food allotment. Both of them averaged—Now, they averaged $1.90 a day at that time. I think the cargo hose was slightly less.

We also accumulated those days the barge worked on our vacation pay.

Q. In other words, the week that you were off, you got this hose pay and what you might call ration money and accumulation for vacation, is that right?

A. Yes, sir.

Q. From the time that you started to work on the Pfeifer No. 2 up to date of this accident, had you always been a mate on that vessel—I mean, from the time you started on the Pfeifer No. 2 up to the time of your accident, had you been a mate on this vessel during that whole period?

A. Yes, sir.

Q. There came a time prior to the accident that you developed some pump trouble; is that right, on the Pfeifer No. 2?

A. Yes, sir.

Q. What pump was involved?

A. The port pump, as I recollect, sir. The port pump.

Q. How long was that before your accident, if you can recall?

A. The trouble developed no more than one or possibly two days before the accident.

* * * * * * *

Q. After you had finished pumping the load, where did your vessel go after that?

A. Well, it was necessary to repair the pump. We were ordered into the yard at West New Brighton for repairs.

Q. That is Staten Island; is that correct?

A. Yes, sir.

Q. Did the Pfeifer Oil Company have a repair dock over there, repair equipment?

A. Yes, sir.

[fol. 24] Q. Do you recall how long before January 22nd, that is, the day of your accident, that the Pfeifer No. 2 was taken over to this repair dock?

A. I don't recall the exact time of the day that we arrived there; but I do know that we worked all the preceding day or the preceding afternoon, anyway, in dismantling the pump in question.

Q. When you are speaking about preceding day, do you mean the day before your accident?

A. Yes, sir.

* * * * * * *

Q. Well, the afternoon before your accident, what work did you do?

A. We helped disassemble the pump. We took the bad part which was the propeller and shaft and we carried it across the Winisook, across the basement, which was the machine shop, and brought the new propeller and shaft down.

* * * * * * *

Q. Now, on the night before your accident, did you leave the vessel or did you stay on the vessel?

A. I stayed aboard the vessel.

Q. And did you eat on the vessel that night?

A. Yes, sir.

Q. And did you have your breakfast aboard the vessel the next morning?

A. I did.

Q. Now, the next morning when you turned to and went to work, what did you do?

A. Well, the afternoon before, it had been raining on the 21st and in working around the pump we had erected a canvas canopy, over it, so that we could work there without getting too wet, and amongst other things, the morning of the accident, I did help dismantle that canopy, just getting parts ready for the assembly of the pump.

* * * * * * *

Q. I show you this rough diagram made by you and ask you if that shows roughly the dock, the raft you spoke about,

[fol. 25] the Winisook and the Pfeifer No. 2? Roughly, does that describe the dock?

A. It does.

Mr. Kilroe: I offer that in evidence.

Mr. Lamb: No objection.

(Diagram marked Plaintiff's Exhibit No. 1 in evidence.)

* * * * * * *

Q. I show you this photograph and ask you if that is a true representation of the portion of the barge, the Winisook?

A. It doesn't show the one end, but both ends are exactly alike.

* * * * * * *

Mr. Kilroe: I offer that in evidence.

The Clerk: Photograph, Plaintiffs' Exhibit No. 2 in evidence.

(Photograph of the barge Winisook was marked Plaintiff's Exhibit No. 2 in evidence.)

* * * * * * *

Q. And I note in the center there, there is a black, a beam or davit?

A. Yes, sir.

Q. Could you tell us, how could you reach that davit?

A. There was only one way to reach it and that was by—it had small ledges, shown on that picture, by going out the doors and proceeding along that ledge to a point where the lines were secured to that center davit or a bitt.

Q. In other words, was there an entranceway from the inside of the Winisook that you could use to get out to this center davit?

A. No, sir; there was no way to reach that center davit, except by way of the rail or catwalk along the edge of the boat.

Q. Can you tell us your best estimation of the width of this catwalk or ledge that led out to this center davit on the Winisook?

A. It was no more than 12 inches.

* * * * * * *

[fol. 26] Q. Now, I notice in this photograph that there is a line running along the side; and it looks like a wire attachment above the catwalk.

A. Yes, sir.

Q. What did you call that line?

A. That would be a life line, safety line.

Q. And how far above the catwalk was this life line or safety line, a distance, your best estimate?

A. Well, it was close to four foot.

* * * * * * *

Q. Now, you have already testified that you did some work in this dismantling of the canopy on board the Pfeifer No. 2; is that correct, on the morning of the accident?

A. Yes, sir.

Q. Now, who was in charge of this operation of rebuilding this pump?

A. Well, in overall charge there was one absolute boss, that was Mr. Edward Smith, but the actual repair work was under the actual control of Mr. Steven Smith, his brother.

Q. So the man actually in charge was Steven Smith?

A. In immediate charge of that job, yes, sir.

Q. Now, after you dismantled this protection that was over the pump, did you receive orders from one of your superiors to do something?

A. I did.

Q. And who did you receive orders from?

A. Mr. Edward Smith.

Q. And will you tell us what orders you received?

A. We had been busy for approximately an hour, and Mr. Smith determined that it was too much help on the one job, and he said, "Mr. Braen, you were formerly a carpenter," and I said, "Yes."

He said, "Well, I would like you to finish putting this top deck of planks on this raft over here, so that we can use it. Get this job done."

Well, that was it.

Q. Now, this raft was located in the position, the raft that you are referring to, it was this raft that was between [fol. 27] the pier and the Winisook; is that right? As shown in this rough diagram of yours?

A. Yes, sir; it was between the Winisook and the dock.

* * * * * * *

A. Upon receiving the orders from Mr. Smith to finish laying this deck on the raft, I first proceeded to get the necessary hammer, nails and saw and other material up to the door that I intended to use, which was on the northwest end, I would say, northwest end door.

After getting the material there, I proceeded out along this raft with intentions of releasing a line from the bitt, in order to pull the raft up opposite the door where I could secure it, put a ladder down to it, and put the material down and finish the job.

Q. Now, did you proceed out on the catwalk in furtherance of this plan of yours?

A. I did.

Q. Did you ultimately reach this davit, the line that was attached to the raft?

A. Yes.

Q. Will you tell us what you did when you arrived at the davit?

A. Well, there was one of two things that I could do: Either I could attempt to untie the knots, or attempt to slide the knots back along the line so that it would enlarge the loop so that I could lift that off the bitt.

Q. Well, what did you do? Which method did you select. What did you do?

A. As I had to work mostly with one hand, I was attempting to slide the knots back along the line.

Q. As you were doing this, would you describe to his Honor and the jury the position that you took, the position of your feet, the position of your body as you were carrying on this operation of sliding the knots back as you described?

A. I went up to the edge of the opening, just in front of the bitt. My left foot was against the inboard side of the barge; my right foot was about a foot or a foot and a [fol. 28] half ahead of my left foot and on the outside edge of the barge.

I was in a deep crouched position working on this line. (indicating).

Q. Now, which hand, if you can recall, which hand were you using working on the line, and what was the position of your other hand?

A. I was attempting to hold onto this wire cable that was before mentioned, about four foot above the deck and was working with my right hand on the line.

Q. And as you were working in that position, did something happen to you?

A. Yes, sir.

Q. What happened?

A. I felt a rolling, slipping sensation under my right foot, something apparently gave way. It caused my foot to slide inboard, throwing the weight of my body away from the barge and into the direction of the water.

Mr. Lamb: I move to strike out apparently something gave way, as a conclusion.

The Witness: Something did give way.

The Court: All right. You say something did give way?

The Witness: Yes.

Q. You say that your right foot slipped inboard, that would be toward the side of the Winisook; is that right?

A. Yes, sir.

Q. And as you were in this position, so we will make sure that we know where you were standing, which position was your right side facing, the right of your body, facing?

A. My right side would be on the outboard side.

Q. When you say outboard side, what do you mean? Is that the water side?

A. That is the water side, yes, sir.

Q. When you say inboard, you mean in toward the side of the Winisook; is that right?

A. Yes, sir.

[fol. 29] Q. Now, you have told us your foot slipped, your right foot slipped or slid in and then what happened to you?

A. It threw the weight of my whole body outboard or out over the water, the wire being so high and out of reach I had nothing to grasp.

I simply had nothing to prevent myself from falling.

Q. And did you fall?

A. I did.

Q. Where did you fall?

A. I fell directly onto the raft which was then directly below me.

• • • • • • •

Q. And could you tell us what the weather conditions were on the day of this accident?

A. Yes, sir; it had been raining the day before, but was not raining at the time of the accident. It was damp, and as I remember, very little wind, at least in that location.

Q. Well—

A. But it was wet.

Q. As you walked along this catwalk of the Winisook, was there any movement of the Winisook due to the tide or waves or any other condition that you could notice?

A. None that I noticed, sir.

Q. The Winisook was anchored in the water, was it not?

A. The Winisook was tied to the dock.

Q. Yes; but in the water?

A. In the water.

• • • • • • •

Cross examination.

By Mr. Lamb:

• • • • • • •

Q. So you were still up until 1953, a trained and capable carpenter, weren't you?

A. Oh, yes.

• • • • • • •

Q. Let's go back to the time before your accident, Mr. Braen.

You had been working on the Pfeifer 2, and then she was sent into the yard over there for Pfeifer?

A. Yes.

Q. At West New Brighton?

A. Yes, sir.

[fol. 30] Q. And that is a place that was used at that time by Pfeifer for tying up and making repairs of a minor character to their vessels, wasn't it?

A. Yes, sir.

Q. That is what it was used for exclusively, wasn't it?

A. No, sir.

Q. What else was it used for?

A. It was also used for tying up the barges on week-ends; by week-ends, I mean Saturdays and Sundays.

Q. Thank you for the correction. You are quite right. It is used occasionally just to lay up the boats that are not to be in use?

A. Yes, sir.

Q. And normally that might be a week-end; sometimes it is for longer than that, right?

A. Very seldom for longer than that, sir.

Q. Very well.

In any event, it was used for a tie-up place or else for doing some minor repair on a boat?

A. Major repairs.

Q. You call them major? I call them minor; there was no drydock there, was there?

A. All right, sir, I will allow that.

Q. All right.

There was no drydock there, was there?

A. No, sir.

Q. You couldn't do any bottom repairs there?

A. Yes, sir.

Q. On the bottom of the water?

A. Yes, sir. You could through the tanks on the bottom; this raft was under there, and the welder could weld the side.

Q. You never participated in doing any of that, had you?

A. Naturally we would, because there had to be somebody stationed at all times on the deck so that if a boat came along there would—that would cause that barge to rock, and the welder had to be notified to get out of there or he would be crushed.

Q. So that you participated sometimes in helping out with these repairs that you call major repairs?

A. Yes, sir.

[fol. 31] Q. And at other times when the boats ran over there would you help with other types of repair work?

A. Now, I don't know just what you mean by that.

Q. I meant, were there times when you worked up on the land doing something in connection with this, some repair work?

A. Yes; we were called on to go on land.

Q. As a matter of fact, when the boats were over there your work varied considerably depending on what they had to do, what had to be done around that place?

A. Yes.

Q. Sometimes you would be working on land; sometimes you would be down on the Wimisook; sometimes you would be down on a barge; sometimes you might be up in the shop?

A. Wherever we were ordered to go, we went.

* * * * * * *

Q. So, during the normal working hours of the day of the 21st, the Pfeifer No. 2 was tied up, wasn't she?

A. Yes, sir.

Q. And you worked around there on the 21st?

A. Might I add something there? The normal working hours aboard a barge go over a 24-day period.

Q. You first said yes to the question that I asked you, didn't you?

A. Yes, sir.

Q. There are different working hours for men that are working at the plant or on shore down there, aren't there?

A. Yes; there are.

Q. And those working hours are what?

A. Normally eight hours a day.

Q. Eight to four?

A. Yes, sir.

Q. And on the 21st, you worked from eight to four, did you not?

A. On the 21st?

Q. That is right.

A. Yes, sir.

Q. And that was the normal working hours at the plant?

A. I wouldn't say that I didn't put in more than just eight to four. I might have worked earlier in the morning in tying up that boat, sir.

[fol. 32] Q. I am talking about during the day light hours.

A. During the day light hours, I did work from eight to four.

Q. Those are plant working hours, not boat working hours?

A. I never knew there was any difference between boat working hours and plant working hours.

As long as I worked for Pfeifer Oil I never knew this. There was never any change in our pay checks or any nature by which we would know that.

Q. Didn't you just tell us that eight to four were not the normal working hours, that you worked twenty-four hours a day?

A. It was only our hours that were changed.

Q. You only worked from eight to four on the 21st; didn't you?

A. That is right.

Q. Now, on the 22nd, you turned to again at eight o'clock in the morning?

A. Yes, sir.

Q. That is, you started working at eight o'clock?

A. Yes, sir.

Q. And you intended to work only until four o'clock that day; is that right?

A. Unless the boat went out prior to that.

Q. Unless the boat went out prior?

A. Yes, sir.

• • • • • • •

Q. Now, on the 22nd,—correct that. I will come back to the 21st for a minute.

Referring again to this deposition, or this time that you testified formerly in this case in January of 1954, do you remember being asked this question and making this answer on page 10, referring now to the 21st of January:

"Q. How long did you continue at work on this job on that day?

"A. Until I should say about four o'clock on that afternoon, the customary quitting time for repair men."

A. This is referring to the 21st?

Q. That is right.

A. That is right.

[fol. 33] Q. Now, on the 22nd, you started at eight o'clock, and then you said that the first thing that you did on the 22nd, if I understood you, was to get some parts in connection—

A. We did get some parts.

Q. When you say we, who are you referring to?

A. Myself and Captain Hull.

Q. Well, what kind of parts were they?

A. Parts having to do with the repair of the pump.

Q. You don't know anything more then about them than just that?

A. Well, I would probably know what parts they were and where they fitted; but I couldn't properly call them by name.

Q. You are not really a machinist or a mechanic, are you?

A. I wouldn't say that I could qualify as that, sir. No, sir.

Q. And the work that you were doing insofar as bringing any parts to the vessel, that was, I think as you previously described it in this deposition, just muscle work?

A. Not necessarily. Captain Hull and I did partially take the pump apart and have it all ready for them to go to work on. We did that in transit on the way over to the yard.

Q. I am talking now about down at the yard, in the yard, on the morning of the 22nd. These parts that you got, that you and Captain Hull got?

A. Yes, sir.

Q. What you did was simply carry these parts on this pallet or stretcher, wasn't it? You lifted the stretcher?

A. That was not done on the 22nd; that was done on the 21st. The heavy parts on the pallet.

Q. Do you remember being asked this question—being asked these questions and making these answers on page 12:

"Q. I think you told me on the morning of the 22nd you turned to again to work on this pump?

"A. That is right, sir.

"Q. What did you do to start, the first thing?

"A. The first thing was to get the necessary repair parts from the Winisook on the deck of the Pfeifer No. 2.

[fol. 34] "Q. What means were you using for taking the parts to the Pfeifer No. 2?

"A. Well, we had sort of a stretcher, and you carry the extra parts on that stretcher. And mostly I was doing muscle work, holding up one end of the stretcher."

A. Yes, but then the parts had already been carried from the machine shop down to the Winisook; then they were on the deck of the Winisook.

Q. The day previously you had helped carry them from the machine shop down to the deck of the Winisook; so on the morning of the 22nd, you merely helped to carry them from the deck of the Winisook to the deck of the barge?

A. Yes, sir.

"Q. How long did you continue doing that job?

"A. I would say approximately one-half hour."

A. It might have been a little more than that, but I would say that that would qualify it.

Q. Certainly you don't dispute that you so testified?

A. Yes, that is right, that is all right.

Q. And your recollection was much better then?

A. Yes.

Q. And then do you remember being asked this question and making this answer:

"Q. Then what did you do?

"A. Then I was given orders to see about putting a deck on this raft."

A. Yes.

Q. Do you remember so testifying?

A. Yes.

"Q. What time would you say that was about?

"A. Well, it was about half-past eight or shortly after."

[fol. 35] Do you remember so testifying?

A. I would say that that is right, yes.

"Q. Who gave you those orders?

"A. Mr. Smith; of course, my captain, Captain Hull was present also."

A. That is right, Mr. Hull was present aboard the boat.

Q. But you—he had nothing to do with giving you those orders?

A. No, sir.
Q. It was Mr. Edward Smith who gave you those orders?
A. That is right.
Q. Mr. Edward Smith was not the captain of the barge?
A. No, sir.
Q. He had no connection with the barge in any capacity?
A. Oh, yes, sir.
Q. I said in any capacity relating to the barge?
A. Yes, sir.
Q. Was he a mate?
A. No, sir; he was our absolute boss.
Q. He was a boss over all of the men?
A. Over the entire fleet.
Q. But he wasn't connected with any particular vessel?
A. He was connected with all of them, sir.
Q. That is right; connected with all.
He was located ashore, wasn't he?
A. Well, he gave me my orders on the deck of the barge.
Q. But, Mr. Smith didn't ordinarily travel on the barge Pfeifer No. 2?
A. No, sir.
Q. He didn't travel on any particular barge in any capacity at that particular time?
A. Not generally.
Q. So that he was a shore-side manager, wasn't he?
A. A what?
Q. A shore side manager? Haven't you heard of that expression?
A. Yes, sir.
[fol. 36] Q. Now, do you remember being asked this question and making this answer:

"Q. What were you told to do?
"A. I was merely told to put the plank decking, to finish the plank decking on the raft."

A. Yes.
Q. Do you remember so testifying?
A. Well, if it is there, I must have testified to that.
Q. That was correct, wasn't it?
A. Yes, insofar as it went; yes, sir.
Q. Do you mean to say that there is something omitted from it?

A. I would say there was.

Q. I can read it to you again:

"Q. What were you told to do?

"A. I was merely told to put the plank decking, to finish the plank decking on the raft."

Would you say that that is correct or not?

A. Well, I don't recall having used the word, "merely," but insofar as it goes, that statement is correct.

Q. Now, this Winisook, that was what you knew down there at the plant as a repair barge, didn't you?

A. Yes, sir.

Q. That Winisook, it didn't carry cargoes around the harbor, did she?

A. No.

Q. As a matter of fact, as long as you had worked for Pfeifer prior to your injury, she had always been at the yard?

A. It had always been at the yard, yes, sir.

Q. And she was used for storing parts and she also had some equipment on board that could be used for making repairs, didn't she?

A. Yes, sir.

Q. She is what is frequently termed a work barge or repair barge?

A. Yes, sir.

Q. She was permanently made fast to a dock down there?

A. Permanently, no, sir.

[fol. 37] Q. When I say permanently, I meant she was secured by lines that were made fast to the dock?

A. A line is not of a permanent nature.

Q. I didn't mean that she was riveted or anything like that; but she wasn't moved out of there during the time that you worked for Pfeifer?

A. By our of there, what do you mean?

Q. I meant out of the yard.

A. Out of the yard, no, sir.

Q. So when you are suggesting that it was not permanent, what you mean, it could be shifted back and forth?

A. Or turned around.

Q. Or turned around as it might be necessary or convenient in connection with some repair job down there?

A. Yes, sir.

Q. But also still serving the function of a repair barge; right?

A. Yes, sir.

* * * * * * *

Q. I show you this photograph and I will ask you if, when the door of the barge is open you can see in that photograph the planking that extended from the Winisook across to the deck?

A. I can.

Q. And is that the type of planking that was there at that time?

A. Not always; they changed quite often.

Q. Was it of that general type?

A. Of that general type, yes, sir.

Q. Was its location the same as the location indicated in that photograph?

A. Not always, no, sir.

Q. Well, I am talking about the time of the accident.

A. At the time of the accident, I would say that that was approximately the location.

Mr. Lamb: May I offer this in evidence?

Mr. Kilroe: No objection.

(Photograph marked Defendants' Exhibit A in evidence.)

* * * * * * *

[fol. 38] Q. Now, I show you another photograph, Mr. Braen, and ask you if you can identify that photograph as showing approximately the entire side of the Winisook that would be toward the raft showing both doors open and showing the recess in which the bitt is located?

Does it show that?

A. It does.

Q. And that would be the side which you were walking on, the side where the accident occurred?

A. It would.

Mr. Lamb: I offer that in evidence.

* * * * * * *

The Clerk: Photograph marked Defendants' Exhibit B in evidence.

* * * * * * *

Q. Now, this deck that you were to put on the raft, it was in process of being built at the time you were told by Mr. Smith to do that work, wasn't it?

A. The raft?

Q. The deck on the raft, it was partly finished?

A. The raft had been in existence for a long time.

Q. The decking, you understand me?

A. The decking, yes.

Q. The decking was partly finished, wasn't it?

A. Yes, sir.

Q. What he wanted you to do was to finish that decking?

A. Yes, sir.

* * * * * * *

Q. Will you just put a little X on the diagram at the point of the door where you came out the door?

A. Yes.

Q. Now, you put an X on the diagram at this point?

A. Yes, sir.

Q. So that you were proceeding then, this way toward the side or end, I should say, toward the end of the Wini sook where the platform ran across from the door toward the dock?

A. Yes, sir.

Q. You had gotten to the point where the bitt was located, and where there was this line that you said you were [fol. 39] going to attempt to get off the bitt in order to shift the raft?

A. Yes, sir.

Q. You had gotten to that point?

A. Yes, sir.

Q. As I understood your testimony yesterday, you said that as you were attempting to slip the knots on the line something gave way?

A. Yes, sir.

Q. And your right foot went out from under you?

A. It slid inboard, yes, sir.

Q. Now, I want to make certain that we are not misunderstanding your testimony.

You said that your—something gave way under your foot, is that right?

A. Yes, sir.

Q. That is what you meant to indicate?
A. Yes, sir.

* * * * * * *

Q. Did you tell him at that time none of the barge's equipment broke to cause my accident?
A. I do not recall.
Q. Did any of the barge equipment break?
A. I would say, something gave way, so something must have broken.
Q. What do you mean, something gave way? You have indicated that your foot slipped in toward the barge. I am asking you, Mr. Braen, did you not tell this man at that time that none of the barge equipment broke?
A. I may have. I don't recall.
Q. And at that time, so far as you know, none of the barge equipment had broken, had it?
A. I couldn't say, sir.
Q. So your statement,—you are not saying today that any of the barge's equipment broke?
A. I would say there had to be a cause for my feet slipping, yes, sir.
Q. Do I take it, then, that you don't know what the cause was?
A. It was more or less on presumption on my part, something did give way beneath my foot.
Q. As a matter of fact, you had never told anybody up to the time that you testified in this court room that some-
[fol. 40] thing gave way on that barge, had you?
A. I don't believe I did; no, sir.
Q. You don't believe you did?
A. No.

* * * * * * *

Q. As a matter of fact, on your testimony, when you testified in January of 1954, you didn't say anything about anything giving way, did you?
A. I don't believe so, no, sir.
Q. As a matter of fact, isn't this what you testified to in your examination in 1954, this is page fifteen and sixteen:

"Let me ask you first, as you were going from this end of the Winisook to the middle, were you carrying anything?
"A. No, I had nothing in my hands."

Do you remember so testifying?

A. Yes.

"Q. All right. Then what did you do?

"A. When I reached that opening it was necessary for me to bend over. The rope was over a stanchion that was about two feet high; they are made permanent so that we can throw a rope, and sort of lasso them as we approach, but naturally this rope, if it was low tide, lay right on the surface, so that it was necessary for me to bend way down in order to get that rope up. And it was just as I was reaching for this rope that my left foot gave way and I slipped."

A. My left foot?

Q. "—gave way and I slipped."

A. If I said that, it was purely a mistake at that time. It was my right foot that gave way.

Q. So far as the rest of what I read to you is concerned, do you agree that that is what you said?

A. That my foot slipped, yes, sir.

[fol. 41] Q. You did not say anything at that time about anything giving away, did you?

A. No, I did not.

Q. Now, Mr. Braen, do you remember that there came a time during the course of this lawsuit when a certain motion was made in this court and you made an affidavit in the office of your attorney, who was then representing you as counsel, which you signed and swore to, signed and swore to?

A. Yes, sir.

Q. Do you remember that that was on the sixth day of September, 1955?

A. I don't know the date, but if that is the date, it is.

Q. I show you this paper which has been taken from the file of the court in this case, and ask you if that is your signature at the end of that paper?

A. That is my signature.

Mr. Lamb: May I have that marked?

The Court: We will deem it marked as Exhibit D.

(Paper deemed marked as Defendants' Exhibit D for identification.)

Q. Now, Mr. Braen, will you look at the top of page three of this affidavit, the first sentence, beginning on that page, and read it, please?

A. While I was attempting to—

Mr. Lamb: Read it to yourself, please.

Q. Does that refresh your recollection as to what you then swore to under oath?

A. Yes, sir.

Q. Did you not then say under oath, while I was attempting to untie the raft from the repair barge, I slipped from a ledge upon which I was standing and fell, thereby sustaining serious injuries which have left me partially disabled?

A. That is true.

Q. Now, in this affidavit, again, you did not state, did you, that anything on the barge gave way?

A. That is correct.

[fol. 42] Q. Up until the time that you testified here in court, you never assigned any other reason for your fall, except that you slipped?

A. That is correct.

Mr. Lamb: I move to strike out the testimony that something gave way, your Honor.

The Court: Overruled.

* * * * * * *

Lester Hull, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

Q. Mr. Hull, on January 22, 1953, who were you employed by?

A. The Pfeifer Oil Transportation Company.

Q. And how long had you been employed by that company prior to January 22nd, 1953?

A. Oh, in the neighborhood of seven years.

Q. And on January 22nd, 1953, what was your title, sir?

A. I was captain of the Pfeifer No. 2.

* * * * * * *

Q. Now, at that time, you were a captain. What were the duties that you—I will withdraw that.

How long had Mr. Braen been on your boat, the Pfeifer No. 2, before this accident, if you can recall that?

A. Well, he wasn't with us too long at that time. I would say maybe four months or so.

Q. And what duties—what duties did he perform on the Pfeifer No. 2?

A. Well, we both performed the same duties being there are only two of us on the boat. They consist of handling lines, turning on the lights; we do our own cooking and pump the boat and load it, the cargo on it; and we do repair, minor repair jobs which are small that we can handle ourselves.

* * * * * * *

[fol. 43] Q. Can you tell us whether during those seven years prior to January 22nd, then, whether this Winisook was left in the same position or whether it was changed?

A. No.

Q. At any time?

A. No; it was turned around twice, as far as I can recall. It was turned around, end for end.

Q. And was the Winisook a permanent part of the dock? What was its location with reference to that?

A. No; she was floating. She had lines to the dock.

Q. Now, on your Pfeifer No. 2, Captain, prior to January 22nd, who made up the payroll?

A. I did most of the time.

Q. And at any time up to from the time Mr. Braen went on your Pfeifer No. 2 up until the time of the accident, was he ever taken off your payroll and put on the shore payroll?

A. Not that I know of, no.

Q. And there were times, were there not, Captain, when your ship would be laid up, when you and someone else might do some repair work on shore, is that right?

A. Yes.

Q. And during those times, would you be taken off that—off the ship payroll and put on the shore payroll?

A. No; it all depends on how long we were going to be in the yard for. We wouldn't be actually taken off. The

payroll would go in under the barge's name, but there would be no difference in the pay or anything to that effect.

* * * * * * *

Cross examination.

By Mr. Lamb:

* * * * * * *

Q. You didn't really make up these payrolls, yourself; did you, Mr. Hull?

A. Well—

Q. You only turned in the names of the men who were on the boat a particular day?

A. I put the hours down for them.

Q. And the hours that they were on board?

A. That is right.

[fol. 44] Q. You didn't really make up the payroll?

A. Not actually make up the payroll.

Q. You didn't compute the payroll?

A. I just sent the men's name in and who was on the boat, and how much they were supposed to get.

Q. Did you send in how much they were supposed to get?

A. Well, grub money, one dollar ninety cents a day.

Q. All right.

Did you compute the amount of money that the man was supposed to get for the number of hours that he worked on the particular boat?

A. The office has already done that. They have a secretary that makes that up themselves.

Q. All I am trying to find out is exactly what you did in connection with the payroll. I believe you testified on direct examination that you made up the payroll.

Now, you didn't actually make up the payroll of any of these men, did you?

A. Not make up the payroll, no.

Q. What you did, you turned into the office the names of the men, including your own, who were on the barge as of a particular day?

A. That is right.

Q. And the number of hours that they worked that day, and in case there was any overtime involved, you would put that in, right?

A. Yes.

Q. Is that correct?

A. Yes.

Q. You said something about the grub money. What would you do, indicate whether the man was on for two meals or three meals?

A. You put all three names on the payroll. The two men that is working on the boat, you put the hours that they worked in. The other men you put just one dollar ninety cents subsistence.

Q. So what you would do in making up the payroll is that you would take the three names of these men who were supposed to be assigned to that boat?

A. Right.

Q. And you would indicate which of the, you would indicate which two of the three was on board, and then the [fol. 45] fellow who was not on board, you would indicate that he was entitled to his subsistence money because he wasn't on board and therefore wasn't entitled to any wages, is that right?

A. Yes.

Q. That is all you did?

A. That is all.

Q. And what the office did, with those records afterwards, you don't know, do you?

A. I know what they done with them. They totaled them up.

Q. Do you know what they assigned any of that pay to, what assignment they made of that pay on their office records afterwards?

The Court: Did you actually see the payroll after that was made up in the office?

The Witness: No, sir.

* * * * * * *

Q. During that five-year period from the time that you first recall the barge being there, up until the time of the accident, it had never been moved away from the plant, there, the yard there, had it?

A. Never been out, no.

Q. Never been out of the yard?

A. No, sir.

Q. Now, the only movement of that barge that ever took place, that you know about, is that the barge had been turned around, end on end, so that one side, which had formerly been toward the dock was turned the other way and the other side was put toward the dock?

A. Yes.

Q. That you only recall occurring twice; is that all?

A. That is all. It didn't happen very often.

Q. The barge was stationed down there as a permanent work barge as a fixture of the repair plant, wasn't it?

A. Yes, sir.

Q. And she was, you say, she was made fast to the dock?

A. Yes, sir.

* * * * * * *

Q. Now, besides those three lines you said there were also two cables?

A. Yes, sir.

[fol. 46] Q. And I gather that the cables ran from the outside corners, that would be this corner of the barge, and that corner of the barge, and by cables, you meant steel cables, didn't you?

A. Yes.

Q. And they were secured to two wrecks?

A. Yes; they had two sunken wrecks, in there, and at low tide, you could see these wrecks, and that is when they must have made these cables fast to them.

Q. So that that was sort of a permanent mooring. It would be quite a bit of a job to unmoor her, wouldn't it?

A. It would be a job, but it could be done.

Q. But the way she was made fast indicated to you as a boatswain that it was intended that she should remain there?

A. Oh, yes.

Q. She wasn't made fast the way a boat was made fast to a dock if she was intended to be moved out again?

A. No.

* * * * * * *

Mr. Kilroe: The plaintiff rests, your Honor.
The Court: All right.

MOTION TO DISMISS

Mr. Lamb: The defendant moves to dismiss the complaint on the ground:

1. That the plaintiff has failed to make out a claim for which relief can be granted under the Jones Act which is pleaded in its complaint as the basis for his cause of action.

The contention that the defendant makes in that connection is that the testimony of the plaintiff shows that he was employed at the time that his injury was sustained to complete the placing of a decking on a raft alongside of a work barge, and that his injury was sustained while attempting to go along the work barge to a point on the work barge where he intended to shift a line from the work barge to the raft in order to put the raft in a position under one of the doors of the work barge; that the evidence clearly shows, [fol. 47] without contradiction, that that work was not work performed as a member or officer of the crew of the barge, and, number two, or of any vessel which was in navigation; that under the Longshoremen's and Harbor Worker's Compensation Act, the exclusive remedy against an employer for a maritime injury is the Longshoremen's and Harbor Worker's Compensation Act, unless the injured man was at the time an officer or member or crew of the vessel, and the plaintiff's testimony shows that he was not at the time that he sustained his injury working as an officer or member of a crew of a vessel.

We further move to dismiss the complaint upon the ground that no other claim upon which relief can be granted can be established by the evidence.

The only other basis asserted as a claim upon which relief can be granted is an alleged unseaworthy condition of the barge Winisook.

The evidence shows that the plaintiff was never employed in any wise as an officer or member of the crew of the Winisook.

We further contend that so far as any other claim for unseaworthiness without fault is concerned, that apart from

the fact that such a claim has not been pleaded, that such a claim could not be the basis for a recovery in this lawsuit, because a claim for relief on that ground is an admiralty cause of action, and a remedy can be had for that only at common law under the saving to suitor clause whereby relief would have to be had in the State Court or in the Federal Court where diversity would be the ground of jurisdiction, and there is no diversity proved in the present case.

Further, again, even if the claim were based upon an alleged condition of the barge Winisook again the man's sole remedy against his employer whom he is suing would [fol. 48] be under the Longshoremen's and Harbor Worker's Compensation Act, because the man has not been shown to be an officer or member of the crew of the barge Winisook.

The Court: I am still going to examine those cases that you submitted.

Your motion involves somewhat of a situation that was discussed at the outset of the case.

Mr. Lamb: That is correct.

The Court: Having reserved decision previously and having had no opportunity to examine those cases which I will before the termination of the whole case, I will reserve decision on that.

* * * * * * *

Edward J. Smith, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Smith, in January, 1953, were you connected with the Pfeifer Oil Transportation Company?

A. Yes, sir.

Q. In what capacity?

A. I was vice president.

Q. Where were you located? Where was your office?

A. 1595 Richmond Terrace, West Brighton, Staten Island.

* * * * * * *

Q. What did you maintain at 1595 Richmond Terrace?

A. A repair yard and a small dispatch work job was done there.

Q. What was the business of the Pfeifer Oil Transportation Company in January of 1953?

A. Transporting of petroleum products.

Q. In that connection you operated what kind of equipment?

A. Barges and tow boats.

* * * * * * *

[fol. 49] Q. How long had you maintained this yard at 1595 Richmond Terrace?

A. We opened up there in 1945.

Q. In January, 1953, can you tell me what equipment there was at that yard that was located in the water?

A. Well, I can't tell you all, but I knew that there was at least two or three barges there. There was the repair barge, the Winisook, and the oil barge, Pfeifer No. 2, and I think there was another oil barge there.

Q. Pfeifer No. 2 was a barge used to carry oil products?

A. Yes, sir.

Q. If there was another barge there, that also would have been a barge used to carry oil products?

A. Yes, sir.

Q. I meant as part of the plant at 1595 Richmond Terrace, what did you have there in the way of equipment for working on your fleet?

A. We had a covered lighter or a covered barge with some welding equipment on it, and a few other pieces of machinery.

Q. Was that the Winisook?

A. That was the barge, Winisook; yes.

Q. Did you have anything else there besides that Winisook that you used at times for repair work on your equipment?

A. The only thing that we had besides that was a raft.

Q. Upland on shore did you also have any equipment there for the making of repairs on your equipment?

A. We had a little machine shop in the basement of the office building.

Q. Now, coming down to January 22, 1953, that is the day that Mr. Braen sustained an injury down at the yard—you did mention already that the Pfeifer No. 2 was at the yard that day?

A. Yes, sir.

* * * * * * *

Q. On the morning of January 22nd, 1953, did you have occasion to talk to Mr. Braen?

A. Yes.

Q. Will you tell us the circumstances that surrounded your talking to him on that morning?

[fol. 50] A. Well, it was usually my custom to go down aboard the barge any time between 7:30 to nine o'clock and discuss the repairs and so forth with my brother.

Q. Your brother is—

A. Stephan Smith—Stephan L. Smith.

Q. He is in court here?

A. Yes, sir; can I elaborate on that?

Q. Yes. Sure.

A. My brother had charge of all of the repairs and we usually discussed what we were going to do.

On this particular morning, in view of the fact that we had no further cargo for this vessel, Pfeifer No. 2, I had to lay men off; so I went down aboard the barge, and I said, Braen, I have to lay you off. I said to him, in the meantime, can you do any carpentry?

He said, yes.

I said, do you want to finish the deck on that raft that we were building?

I said, it would be one or two days' work.

Q. What answer did he give you?

A. He said yes.

Q. About what time of the day would you say that was?

A. Well, I would say that that was between 7:30 and 8:00 o'clock.

Q. All right.

Now, what did Braen do after you spoke to him? Did he go any place?

A. He left me, and I don't know where he went. I think he went inside the barge.

Q. Which barge?
A. The Winisook.
Q. Did you see him later, inside the Winisook?
A. No, I did not.
Q. Now, did you subsequently see him?
A. Yes.
Q. Where did you see him?
A. When I saw him I said—well, I would say about five minutes later he was down on the raft. He was sitting on the raft. His back was facing towards me and he had one hand on the line, they call it the spring line, but it wasn't a spring line, it was just a line.
[fol. 51] He had one hand on the line, and he was sitting up. I think he had his left leg in this fashion (indicating), but this other leg, I couldn't see. He was partly sitting on that leg, I would say.

* * * * * * *

Q. Coming back to this barge Winisook, how long had you had that barge down at the yard?
A. We purchased that barge in 1950.
Q. What did you do with it after you purchased it?
A. We moored it to the dock.
Q. Where?
A. At 1595 Richmond Terrace.

* * * * * * *

Q. During the time that that barge was there, had it been used for any purpose at all, other than merely as a work barge in connection with repair work?
A. No; other than there was a few items stored there, some tackle, rope, ladders.
Q. Well, then, let me put it to you this way: Had it ever been used for any purpose other than storage and repair?
A. No, sir.
Q. Now, this raft that you spoke about, you said something about asking Mr. Braen if he had been—
A. Could do any carpentry work.
Q. And to complete a deck on the raft?
A. Yes, sir.

Q. Had there been some part of the deck already laid there?

A. I would say three-quarters of it was laid already.

Q. When you spoke to him about laying the balance of the deck, that raft deck, can you recall precisely what were your exact words of your conversation?

A. No, sir; I cannot.

Q. But you indicated before, substantially, it was whether or not he could complete the deck?

A. Yes, sir.

Q. Now, tell me this: Did you at that time, Mr. Smith, say to Mr. Braen that you wanted to complete that raft in [fol. 52] order to use it for any work on the Pfeifer No. 2?

A. No, sir; absolutely not.

Q. Did you have any use for that raft in connection with doing any work on the Pfeifer No. 2?

A. Not at that time.

Q. Did you contemplate using that raft in connection with any work on the Pfeifer No. 2?

A. Not at that time.

* * * * * * *

Mr. Stephan Smith, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

Q. Mr. Smith, were you employed by Pfeifer Oil Transportation Company in January of 1953?

A. Yes, sir.

Q. How long had you been employed by Pfeifer Oil Transportation Company before January 22nd, 1953?

A. Fifteen years.

Q. In what capacity were you employed on January 22nd, 1953?

A. As a mechanic.

Q. And how long had you been a mechanic before that for that company?

A. Approximately six years.

* * * * * * *

Q. Now, as a mechanic for Pfeifer Oil, during the period that you have worked as a mechanic, prior to January 22nd, 1953, what particular work came under your supervision? What kind of work did you do?

A. Repair the pumps, the motors.

Q. Now, in connection with repairing the pumps and motors, would that be pumps and motors?

A. Both.

Q. On both boats and barges?

A. Yes.

Q. Were you in charge of that work or was there somebody else who was your superior?

A. I was in charge.

* * * * * * *

[fol. 53] Q. Now, on January 21, 1953, you remember that there was an injury to a man by the name of Christian Braen that happened over there at the yard?

A. Yes, sir.

Q. Prior to that accident happening, do you remember that there was a covered barge over there at the yard known as the Winisook?

A. Yes, sir.

Q. Now, tell us when you first became acquainted with the Winisook?

A. I believe that it was in '49.

Q. How did you become acquainted with it?

A. I set up the machinery into it.

Q. What?

A. I set up the machinery, to do the repair work.

Q. Now, where was she at that time?

A. West Brighton, Staten Island.

Q. At your yard?

A. Yes, sir.

Q Was that right after you had bought her?

A. Yes, sir.

Q. You said you set up the machinery in her. What kind of machinery?

A. Drill press, welding machine, air compressor.

Q. What kind of work is that machinery used for?

A. For work on the barges.

Q. What was the Winisook used for from that time up to January 22, 1953?

A. Repairing the oil barges and the tugs.

Q. Did she ever leave the yard from the time that she first came down there?

A. No, sir.

Q. How was she moored?

A. By three lines and two cables.

* * * * * * *

Q. During the time that she was there, that you were there at the yard, and while the Winisook was there, was she ever used for any other purpose other than for storing equipment and other repair work?

A. No, sir.

Q. Now, in January, 1953, coming down to the date of January 22nd, was there any raft at the yard?

A. Yes, sir.

[fol. 54] Q. What was the condition of that raft in respect to whether or not it was completed insofar as decking was concerned on the morning of January 22nd, 1953?

A. I would say that it was approximately, practically three-quarters completed.

Q. There was still some decking to be laid on it?

A. Yes, sir.

Q. Do you remember the Pfeifer No. 2 coming into the yard around about this time in January of 1953?

A. Yes, sir.

Q. Can you tell us when she came into the yard?

A. I believe it was, my recollection was about three o'clock in the afternoon.

Q. Of January what?

A. Of January 22nd.

Q. The same day that Braen was injured?

A. No, the day before.

Q. The day before?

A. Yes.

Q. In connection with that barge, after she came into the yard, did you have anything to do with her?

A. Oh, yes.

Q. Tell us what you had to do with her?

A. Well, some times when they have a minor repair, I go to whatever port she is at.

Q. I am talking now when she came into the yard on January 21, 1953, that particular instance. Did you have anything to do with her?

A. Yes.

Q. What did you have to do with her?

A. I went aboard her and inspected the port pump.

Q. And you found that there was something to be done on the port pump?

A. Yes, sir.

Q. Now, on the afternoon of January 21, did you do anything with respect to that port pump?

A. That is the preceding day.

Q. The preceding day, is that right?

A. Yes; I dismantled it.

Q. In doing that work, did you have any assistance?

A. Yes, sir.

[fol. 55] Q. Who helped you?

A. Mr. Donoway, Mr. Braen and Mr. Hull.

Q. What time did you quit work that day?

A. Four-thirty.

Q. Now, on the next morning, January 22nd, what did you do, if anything, with respect to the Pfeifer No. 2?

A. Pfeifer, No. 2, we re-assembled the pump.

Q. Who do you mean by we?

A. Mr. Donoway, myself and Mr. Hull.

Q. You didn't make any mention of Mr. Braen this time?

A. That is right.

Q. Had Mr. Braen been assigned to do anything else that day?

A. Yes, sir.

Q. Tell us what it was.

A. Mr. Smith, my brother, Ed Smith and I have a conversation every morning on what work we are going to do.

* * * * * * *

Q. As a result of that conversation, did anybody give any orders to Mr. Braen?

A. Yes, sir.

Q. Who gave the orders to him?

A. Mr. Ed Smith.

Q. Were they given to him in your presence?

A. Yes, sir.

Q. Tell us what orders you heard him give to Mr. Braen?

A. He ordered Mr. Braen to re-deck the raft.

Q. And about what time of the day was that?

A. I would say about eight-thirty.

Q. Now, did you see Mr. Braen after that?

A. Yes, sir.

Q. And tell us, if you will, please, in your own words, in your own way, just where you saw him and what you saw him doing, and what happened?

A. Well, after that he walked down into the Winisook where we stored some lumber and he got several pieces out. He got the tools, and that is the last I seen of him for a while.

Then, we were standing on the dock also having a conversation, Donoway, Mr. Smith and myself, when I see him again.

[fol. 56] He was on the—this ledge of the barge, walking towards where the raft was tied up. So I turned my back for a moment, and I heard a little commotion, and looked around quickly, and I see Mr. Braen falling, and he was grabbing this one line and he landed on the raft.

* * * * * * *

MOTION FOR A DIRECTED VERDICT AND DENIAL THEREOF

Mr. Lamb: The defendant Pfeifer Oil Transportation Company, Inc. moves for a directed verdict on the ground that on the evidence in this case it appears that the plaintiff has not established a claim for which relief can be granted in this action.

The defendant bases that contention, if the Court please, upon these grounds:

1. The proof shows that at the time the plaintiff sustained his injuries, he was actually located upon a work

barge known as the Winisook, and was attempting to proceed from that barge to a raft, or attempting to shift a raft to put materials on that raft for the purpose of laying a decking on that raft.

There is no dispute in this case that that is the work that the plaintiff was doing at the time of his injury. There being no such dispute, the defendant contends that the proof shows affirmatively that the plaintiff at the time that he sustained his injury was not then engaged as a member of the crew of the Pfeifer II in performing work as a member of the crew of that vessel, and accordingly his work at the time was that of an ordinary maritime worker, who in respect of his employer is covered by the provisions of the Longshoremen's Harbor and Workmen's Compensation Act, which is, by the terms of that act, made the exclusive remedy of such an employee as against his employer.

The Court: May I interrupt there for a moment? I don't quite follow you on that.

[fol. 57] Is it your position that unless a member of the crew is actually at work or on the vessel itself that he could have no claim for anything that happens off the vessel?

Mr. Lamb: No, sir.

That is not my point.

I concede that a man who is a member of the crew of the vessel who may not be on board, may sustain an injury not on board the vessel, but may still have a right of action under the Jones Act.

I do not make that contention.

My contention is that the character and nature of the work the man is performing at the time the injury is sustained, is what governs his remedy; whether or not it comes under the Jones Act or under the Longshoremen's Harbor Workmen's Compensation Act.

And even though the man's general employment may be as a member of the crew, if at the time he sustains an injury he is doing something which is not part of his employment as a member of the crew and not related to carrying out his functions as a crew member, that then he may not recover under the Jones Act.

The Court: Isn't that a question of fact?

Mr. Lamb: It may be a question of fact, your Honor. In many cases it is a question of fact. I say, here it isn't.

* * * * * * *

Mr. Lamb: I further move for a directed verdict in favor of the defendant, Pfeifer Oil Transportation Company, if the Court please, on the ground that as to the claim which was asserted at the outset of the trial as to which I made a motion at the beginning of the trial for the withdrawal of [fol. 58] the claim from consideration in this case, namely, a claim based upon unseaworthiness.

(Off the record discussion.)

* * * * * * *

Mr. Kilroe: The claim of unseaworthiness that was presented at the beginning of the trial and is now being eliminated by stipulation from the case and that the case will be submitted to the jury solely under the provisions of the Jones Act.

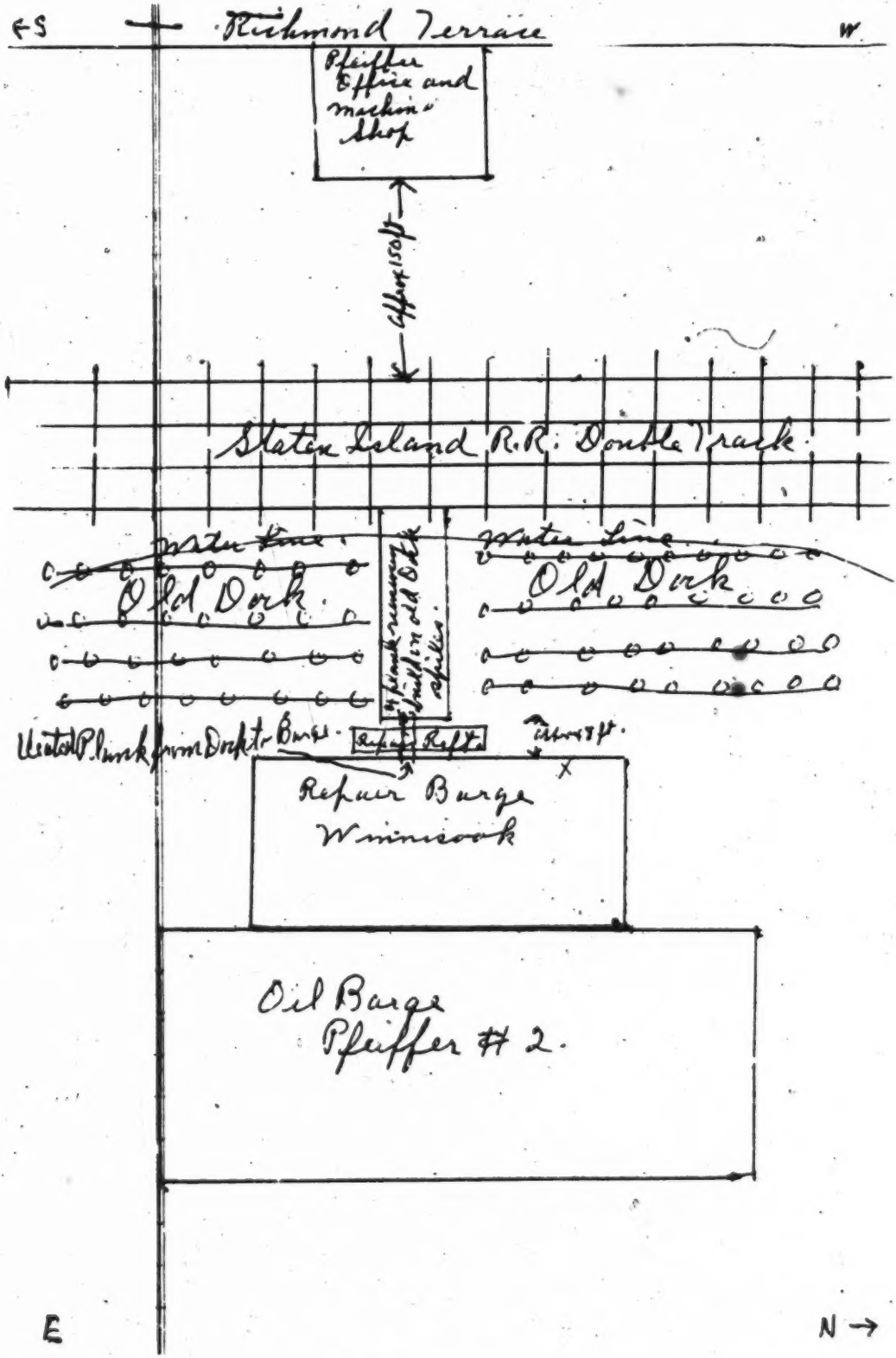
* * * * * * *

I have got a motion for a directed verdict on the ground that the plaintiff has failed to make out a claim under the Jones Act because he has failed to show that at the time of his injury he was engaged in work as a member of the crew of the Pfeifer II, and that the proof shows that the injury arose out of and in connection with the carrying on of carpentry work which was unrelated to his work as a member of the crew of the Pfeifer II.

The Court: Motion is denied.

* * * * * * *

PLAINTIFF'S EXHIBIT "1"—DIAGRAM SHOWING THE DOCK, RAFT AND OIL BARGES



[fol. 60]

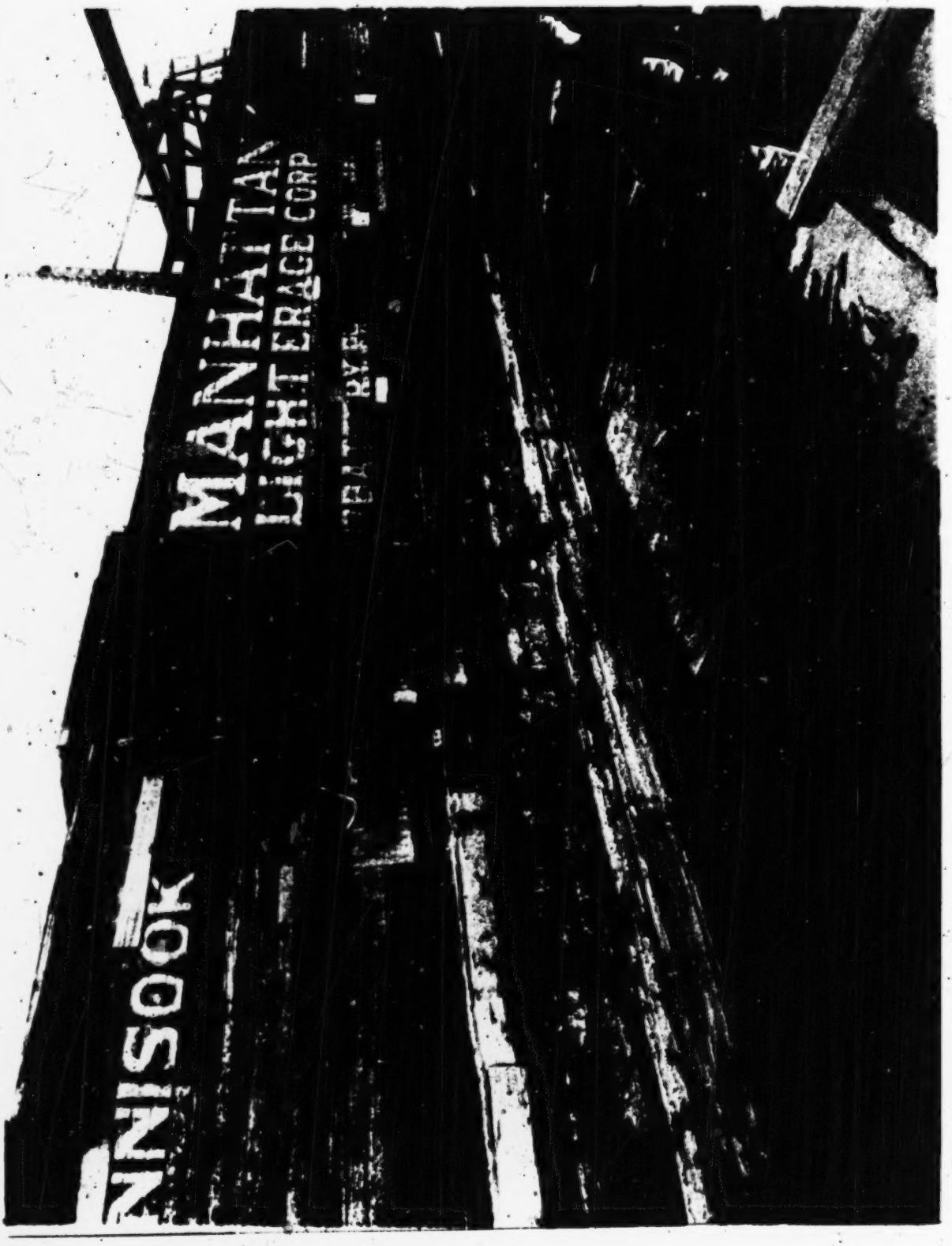
PLAINTIFF'S EXHIBIT "2"—PHOTOGRAPH OF THE BARGE, WINISOOK

[fol. 61]

DEFENDANT'S EXHIBIT "A"—PHOTOGRAPH OF THE BARGE, WINISOOK

[fol. 62]

DEFENDANT'S EXHIBIT "B"—PHOTOGRAPH OF THE BARGE, WINISOOK



[File endorsement omitted]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action No. 13929

CHRISTIAN F. BRAEN, Plaintiff-Appellee,

against

PFEIFFER OIL TRANSPORT CO., INC., Defendant-Appellant.

Appellee's Appendix—Filed October 2, 1958

Bernard Rolnick, Attorney for Plaintiff-Appellee.
Benjamin H. Siff, Of Counsel.

[fol. 65]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF TRIAL

CHRISTIAN F. BRAEN, the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

* * * * * * *

Q. Now, prior to January 22nd, 1953, had you had occasion in the several months that you had been on the Pfeiffer No. 2 to observe this catwalk on the Winisook?

A. I did.

Q. And what were the occasions on which you observed this catwalk on the Winisook prior to the date of this accident?

A. Well, it was whenever the boat tied up on the week-end, that is—where they tied up. That was generally on a Friday night that they tied up. That barge, the doors on that barge would remain open until the mechanics came home at four or half-past four in the afternoon. After that, in order for us to get off our barge, we would have to go down on the ledge of the Winisook, walk around one of the other ends of it, and back along the catwalk until we reached a point opposite the dock and then there was a catwalk just as—well, a cleated plank or two planks cleated together that we would climb up to the dock and proceed on our way.

We would reverse the procedure coming back on Sunday, midnight or whenever we were ordered aboard.

* * * * * * *

Q. Can you tell us, on the occasions that you were on the Winisook before this accident, about the condition, or could you describe the condition of this catwalk to us?

A. Yes, sir.

The catwalk, being a very old barge, a catwalk, the catwalk was in very bad shape. It was splintered, worn, [fol. 66] rounded at the edges, and wasn't composed of any one single plank, but of a series of planks that were more or less laid one after another, one against another in order to make that ledge.

Q. Now, I notice in this photograph that there is a line running along the side; and it looks like a wire attachment above the catwalk.

A. Yes, sir.

Q. What did you call that line?

A. That would be a life line, safety line.

Q. And how far above the catwalk was this life line or safety line, a distance, your best estimate?

A. Well, it was close to four foot.

Q. How tall are you?

A. Five feet, nine and a half inches.

Q. Now, on the side of this opening where that davit was located, I am talking now prior to the accident, were there any handles or other safety devices on the side of that opening before the accident?

A. No, sir.

Q. Now, before the accident was that life line that you see in the picture in the same position as shown in that photograph?

* * * * * * *

How was the raft attached to the Winisook?

A. The raft was attached to the Winisook by means of a line, I would say that it would be an inch or an inch and a half line, and secured to this center davit or bitt.

Q. How did you get down from the Winisook or what method was used to get from the Winisook down to the raft?

A. Well, the raft was practically unreachable where it laid. In order to get down on the raft, it had to be moved up to one of the doors so that you could put a ladder down to it.

* * * * * * *

[fol. 67] Q. Now, Mr. Braen, prior to the date of your accident, have you ever spoken to any of your superiors about the condition of this catwalk?

A. I had.

Q. Who did you speak to?

A. We had discussed several times aboard the boat, Captain Hull, among other crew members of the fleet, and I am sure at one time or another had mentioned the condition to Mr. Smith.

Q. As a result of that conversation was any change made of that catwalk?

A. None that I am aware of.

* * * * * * *

Q. Now, what was your pay as a mate on the date of your accident per month?

A. As I recall it, our hourly rate of pay at that time was somewhere around one dollar, seventy cents an hour.

Q. And you worked a twelve-hour day for two weeks, is that right?

A. Yes, sir.

* * * * * * *

Q. And during the period that you were laid up, if I understand it, I don't think there will be any dispute about

that, you were paid by the defendant, maintenance, amounting to nine hundred and eighty-seven dollars?

Mr. Lamb: We can put that in later.

Q. Is that right?
A. Yes, sir.

* * * * * * *

Cross examination.

By Mr. Lamb:

* * * * * * *

Q. Now, you said that prior to the accident you had had occasion to walk around what you called the catwalk of this barge on many occasions?

A. Yes, sir.

[fol. 68] Q. Getting off the barge and going ashore and coming back?

A. Yes, sir.

* * * * * * *

Q. Now, I want to make certain that we are not misunderstanding your testimony.

You said that your—something gave way under your foot, is that right?

A. Yes, sir.

Q. That is what you meant to indicate?

A. Yes, sir.

Q. And when that something gave way, did your foot simply slide inboard or did your foot go down off the edge of the barge?

A. My foot slid inboard against the side of the barge.

Q. And as this something, whatever it was, gave way, and your foot slid inboard, you went over to your right; is that the idea?

A. Yes, sir.

* * * * * * *

Redirect examination.

By Mr. Kilroe:

* * * * * * *

Q. Now, at any time either in your deposition or in this statement after you said that you slipped did any representative of the defendant ask you what caused you to slip?

A. No, sir.

Q. You said that something gave way under your foot as your foot slipped, right foot slipped inboard; is that correct?

A. Yes, sir.

* * * * * * *

Q. When your foot slipped as you testified, what did you feel under your foot, if anything?

A. A crumbling, rumbling sensation, a distinct feeling that something had given way under my foot.

* * * * * * *

[fol. 69] Recross examination.

By Mr. Lamb:

Q. Mr. Braen, you said in your testimony just a second ago, that when your right foot slipped, you felt like a crumbling sensation under the foot?

A. That is true.

* * * * * * *

Lester Hull, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

* * * * * * *

Q. And prior to January 22nd, 1953, did you go to this repair dock at West New Brighton?

A. Yes; we have been in there many a time. We used to tie up there on a week-end, if there was no work for the boat. They used to have it as a dock for tying up over the week-end.

Q. And I believe you said that you worked for this company about seven years before January 22nd?

A. Yes.

Q. 1953?

A. Yes.

Q. And during those seven years, did you have occasion to use the barge Winisook?

A. Yes; we had to cross the barge many times, and we had to do work on the barge which pertained to our own barge, which pertained to mechanical work, that we had to move our parts onto her.

* * * * * * *

Q. Now, you say that prior to January 22nd, 1953, you had occasion to cross the Winisook to and from your boat, go on the Winisook to and from it, for repairs?

A. That is right.

Q. During that time, did you ever have occasion to examine the catwalk on the Winisook?

[fol. 70] A. On the one end we did, because we did that pretty regular. If it was after four o'clock in the afternoon, the doors of the barge would be closed, and we would have to walk around the one end of her.

Q. I see.

Which end would that be?

A. That would be facing New York, east end, I guess.

Q. And did you have occasion at any time to walk on both catwalks?

A. Well, yes; occasionally we had to go around the other way.

Q. Now, can you tell us in these seven years that you were on and off the Winisook, the condition that you observed of the catwalk?

A. Well, not very wide. It is only about a foot wide, and it consists of two pieces of wood, which one is maybe ten inches wide and the other one is two inches wide or four inches wide, and the outer edge of it is pretty well splintered up in parts.

* * * * * * *

Q. Now, the afternoon that your boat arrived at the repair dock, did you do any work on your boat?

A. Yes, there was some work that I recall that we done. We were going to repair a pump which had broken down two days before, something like that. I know that we made one or two loads with the pump.

Q. When you say we, who are you referring to?

A. Mr. Braen and myself.

Q. And the next morning, did you do any work?

A. Yes; we turned to at quarter to eight—eight o'clock.

Q. And what did you do?

A. Well, there was a few small jobs that me and Mr. Braen could do ourselves which had to be done before the mechanics could work on the pump.

[fol. 71] Q. And that morning, did you do those small jobs?

A. Yes; we had everything all ready for when the mechanics, when they came in to put the pump back together again.

Q. Were you present when Mr. Braen was taken from the raft?

A. I wa

Q. Now, this raft has been testified to yesterday, this raft was used for welding at times?

A. Yes, sir.

Q. Was it used for any other purposes to work on the hull of the vessel?

A. Yes; we used to chip the hulls, paint the hulls.

Q. From this raft?

A. Yes.

* * * * * * *

Cross examination.

By Mr. Lamb:

* * * * * * *

Q. You knew that she was going to be there for some period of time?

A. Not for some period of time, I would say for the next day, anyway.

* * * * * * *

Q. Now, the following morning when you turned to,—you said about a quarter of eight?

A. Well, I got down to the boat, maybe a quarter after seven, seven-thirty, and eight o'clock we usually started the day.

* * * * * * *

Q. Well, now, can you recall just exactly what you did that morning after you got on the boat?

A. Well, I am not— If I am not mistaken, the first thing that we did—

Q. I said you. What did you personally do?

A. Well, I didn't do anything by myself. I had a helper.

[fol. 72] Q. You didn't do anything by yourself?

A. No, sir.

Q. Now, the first thing that you did do that morning,— who was helping you do it?

A. Mr. Braen.

Q. Now, Mr. Braen, then, you and he did what? The first thing that morning, did what?

A. The first thing we did that morning was to move some parts that we had already disassembled off the barge onto the Winisook.

Q. I presume that you must have disassembled it on the afternoon before?

A. The afternoon before which I already said.

Q. You had disassembled it?

A. Partly. I wouldn't say that we had the whole pump disassembled, but we had part of it.

Q. So that the next day, the first thing that you and Mr. Braen did was to move some parts of this, a disassembled pump, over to the Winisook?

A. That is right.

* * * * * * *

EDWARD J. SMITH, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

* * * * * * *

Q. Now, coming to the deck of the barge, which has been described as a catwalk, was there any occasion for any of the employees of the Pfeiffer Oil Transportation Company from time to time to use that, any part of the deck

of that barge other than purposes of getting at the lines that moored either the barge or the raft?

A. Yes, sir.

[fol. 73] Q. Will you tell us what occasion that would be?

A. Usually when we tied up during the week-end, or when we laid off the crew, particularly at night, if it happened at night, why, they would have to walk around it to get to shore.

Q. Were there times when the men did walk around it to get to shore?

A. Yes, sir.

* * * * * * *

Mr. Stephan Smith, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

* * * * * * *

Q. In doing that work, did you have any assistance?

A. Yes, sir.

Q. Who helped you?

A. Mr. Donoway, Mr. Braen and Mr. Hull.

Q. What time did you quit work that day?

A. Four-thirty.

* * * * * * *

Cross examination.

By Mr. Kilroe:

* * * * * * *

Q. Do you know whether or not the contract in existence between the union representing Mr. Braen and your corporation had any provisions in it about lay-offs?

A. No, I didn't.

* * * * * * *

The Court: Let me ask you this, Mr. Smith: During the period of four months or so that Mr. Braen worked on

[fol. 74] the Pfeiffer No. 2, had you had any prior occasion where you laid him off the ship on one day and you reemployed him the next day for some carpentry work or something?

The Witness: No, sir.

* * * * * * *

ALBERT CORNETTE, a witness called on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kilroe:

Q. What is your business, Mr. Cornette?

A. I am a business agent for the United Marine Division, Local 333.

Q. And in 1953, was Mr. Braen a member of your organization?

A. Yes, sir.

Q. In 1953, did your organization have a contract with a number of companies, shipping companies, including the Pfeiffer Oil Company?

A. Yes, sir.

Q. Have you that contract with you, sir?

A. Yes, sir.

Q. Could I see this contract?

A. Yes, sir.

* * * * * * *

Voir dire examination.

By Mr. Lamb:

* * * * * * *

Q. That wasn't the question I asked you. The question that I asked you, is whether or not on January 22, 1953, before this contract went into effect on February 1, whether there was any provision in your then-labor contract with [fol. 75] respect to any prior notice to a man if he was

only being laid off for a day or two while a boat was tied up for only a day or two?

A. That clause covered him.

That clause was in the prior contract and that clause protected—pertained to the membership.

Q. Was there any other clause in the contract in effect prior to this one that would have relation to the situation whether or not any notice would be required to be given to a man if it were a matter of only a temporary lay-off for a day or two while a boat was temporarily laid off?

A. There were no other provisions except that.

* * * * * * *

Mr. Kilroe: That is the only thing that I am going to offer—that is the only thing I am going to refer to, your Honor, is this one clause, and I am going to request your Honor for permission to read this one clause K to the jury.

The Court: Yes, you may do so.

Mr. Kilroe: "Providing a vessel is in operation in excess of forty-eight consecutive hours there shall be no lay-offs of any of the crew except upon three days' notice to them after the vessel is moored in her berth. Vessels not so operating, there shall be no split time and the working day shall be from midnight to midnight. Employees who quit their job without giving three days' notice of intention to leave shall forfeit thereto to the employer three days' pay as liquidated damages."

* * * * * * *

[fol. 76] Cross examination.

By Mr. Lamb:

* * * * * * *

Q. Then what does it mean, on vessels not so operated, that would be a vessel not in operation in excess of forty-eight consecutive hours?

A. Well, that would mean this: That after a man is given his three-day notice, and he may be called to report to the vessel to do repairs on the vessel, then that clause would not apply.

* * * * * * *

CHRISTIAN F. BRAEN, the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. Kilroe:

Q. Mr. Braen, you were present in the court yesterday when Edward Smith testified that he told you on the morning of January 22nd at about eight-thirty that you would be laid off. Did he ever make such a statement to you?

A. He did not.

Q. And his conversation with you was the conversation that you previously testified to, is that right?

Mr. Lamb: I object to the form of the question.

Q. The conversation that you had with Mr. Edward Smith was the conversation that you previously testified to?

Mr. Lamb: I object to the form of the question.

The Court: Overruled.

A. That is correct.

* * * * * * *

[fol. 77]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 40—October Term, 1958.

(Argued October 24, 1958)

Docket No. 25095

CHRISTIAN F. BRAEN, Plaintiff-Appellee,

—v.—

PFEIFER OIL TRANSPORTATION COMPANY, INC.,
Defendant-Appellant.

Before: Swan and Moore, Circuit Judges, and Kaufman, District Judge.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Bruchhausen, Judge, after trial to a jury in an action under the Jones Act, 46 U. S. C. A. §688. Reversed.

Purdy, Lamb & Catoggio, Attorneys for Appellant. Edmund F. Lamb of Counsel.

Bernard Rolnick, Attorney for Appellee. Benjamin H. Siff of Counsel.

OPINION—Decided January 23, 1959

Swan, Circuit Judge:

This is an action brought under the Jones Act, 46 U. S. C. A. §688, in which plaintiff recovered judgment after a [fol. 78] jury trial. The principal question presented by the appeal is whether at the time of his accident plaintiff was a "seaman" injured in the course of his employment within the meaning of the Jones Act, which provides in pertinent part:

> "Any seaman who shall suffer personal injuries in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * *"

The appellant contends that plaintiff at the time of his injury was subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §901 *et seq.*, which provides his exclusive remedy against appellant.

Plaintiff was employed as mate on appellant's barge Pfeifer No. 2. On the day prior to his injury, which occurred on January 22, 1953 Pfeifer No. 2 came to defendant's repair yard at West Brighton, Staten Island, for repairs to a cargo pump. At the repair yard defendant maintained a covered lighter, known as the Winisook, which was used as a work barge. Its inshore side was connected with the dock by a plank runway, and between the Winisook and the dock was a raft which was employed in making cer-

tain kinds of repairs but was not intended to be used and was not used in repairing the cargo pump or Pfeifer No. 2. When the No. 2 was brought to the repair yard she was moored to the outshore side of the Winisook. On the morning of the accident plaintiff worked aboard for about an hour in dismantling the cargo pump. He was then ordered by defendant's vice-president in charge of repair work to perform some carpentry work on the above mentioned raft.[1] [fol. 79] Plaintiff collected carpentry tools to be used by him on the raft and then proceeded along the "catwalk" on the side of the Winisook preparatory to boarding the raft and commencing work on it. While doing so he fell from the Winisook to the raft, sustaining the injuries for which he sued.

At the close of plaintiff's case defendant moved to dismiss the action. Decision on the motion was reserved. Defendant's motion for a directed verdict at the close of the entire case was denied. A motion for judgment n.o.v. was also denied. On its appeal defendant argues (1) that plaintiff as a matter of law is not entitled to maintain suit under the Jones Act, (2) that even if the evidence gives rise to a fact issue as to plaintiff's right to maintain the suit, the trial court failed to instruct the jury properly, and erred in denying defendant's requests to charge; and (3) that error was committed in denying defendant's motion to strike plaintiff's testimony that something on the Winisook gave way causing him to fall.

---

[1] Plaintiff testified on direct examination as follows:

"Q. Now, after you dismantled this protection that was over the pump, did you receive orders from one of your superiors to do something? A. I did.

Q. And who did you receive orders from? A. Mr. Edward Smith.

Q. And will you tell us what orders you received? A. We had been busy for approximately an hour, and Mr. Smith determined that it was too much help on the one job, and he said, 'Mr. Braen, you were formerly a carpenter,' and I said, 'Yes.'

He said, 'Well, I would like you to finish putting this top deck of planks on this raft over here, so that we can use it. Get this job done.'

Well, that was it."

It is established law that determination as to whether a maritime employee, who may generally be classified as a seaman, may recover indemnity for injuries under the Jones Act or is limited in a federal court to compensation under the Longshoremen's and Harbor Workers' Compensation Act depends upon the nature of the service being performed at the time the injuries are sustained.[2] The Longshoremen's [fol. 80] Act restricts the benefits of the Jones Act to "members of a crew of a vessel." *Swanson* v. *Marra Bros.*, 328 U. S. 1. To recover, therefore, the present appellee had to be a member of the crew of Pfeifer No. 2, as that term is used in the Longshoremen's Act, at the time of his injury. See *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370, 371. In that case a verdict for Senko was set aside on appeal upon the ground that the evidence was insufficient to support the finding that he was a member of a crew. This in turn was reversed, a majority of the Supreme Court holding that there was sufficient evidentiary basis for the jury's finding. In so holding the court cited *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 257 for the proposition that "whether or not an employee is 'a member of a crew' turns on questions of fact," and that if a finding on the question has evidence to support it, the finding is conclusive. We are well aware that a jury verdict is not to be upset by an appellate court, if there is any evidence to support it. But we do not understand that, when there is no such evidence, the appellate court may not upset the verdict.[3] In the case at bar there was no contradiction of plaintiff's testimony as to the nature of the service he had been ordered to perform and was about to perform when the accident happened. Nor does the record contain, in our opinion, any evidence susceptible of contrary inferences. Consequently we believe that plaintiff was subject to the Longshoremen's Act,

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[2] *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 137; *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190; *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, 340; *Senko* v. *La Crosse Dredging Co.*, 352 U. S. 370, 371.

[3] See *Norton* v. *Warner*, 321 U. S. 565, and the dissenting opinions in the *Senko* case, 352 U. S. 374-379, and in *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. ——, 2 L. Ed. 737.

not the Jones Act, since he was not injured in the course of his employment as a seaman or as a member of the crew of Pfeifer No. 2, and that defendant's motion for a directed verdict should have been granted.

[fol. 81] However, should we be wrong in thinking that no jury question was presented, the case might be returned to us to pass upon the appellant's contention as to the instructions given the jury.[4] Therefore we shall consider them. We are convinced that the charge on this subject was inadequate. The court charged:

> "While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that at the time of the accident he was a member of the crew.
>
> Whether or not at the time of the accident he was engaged in functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine."

Following defendant's exception to the charge, the court stated in a supplemental charge:

> "I just want to make one amendment to my statement to you, ladies and gentlemen.
>
> I did state that it is not seriously disputed that the plaintiff was not a member of the crew. Apparently, according to the defendant's statement, he says that it is a serious issue.
>
> So I will leave that as an issue."

This only added further confusion to the original charge which failed to give the jury any test for determining whether the Jones Act was applicable to plaintiff. Defendant's exceptions to the charge were well justified. The court refused to submit four requests to charge which em-

---

[4] In the *Senko* case, at page 372, the court noted that the jury's finding "was made under specific instructions not objected to here."

[fol. 82] body a correct statement of the applicable law and should have been given, at least in substance.[5]

We see no merit in appellant's contention that plaintiff's testimony that something "gave way" on the Winisook causing him to fall should have been stricken.

For the reasons stated in the first part of our discussion we think the motion for a directed verdict should have been granted. Accordingly the judgment is reversed with directions to dismiss the complaint.

KAUFMAN, District Judge (dissenting):

I fully agree with the majority as to the insufficiency of the lower court's charge with respect to plaintiff's status at the time he was injured. On that ground, I would reverse and remand. However, the majority has gone further and directed a dismissal of the complaint and on this point I must regretfully dissent.

In effect, the court finds as a matter of law that the plaintiff was not injured in the course of his employment [fol. 83] as a seaman or crew member. As the majority concedes this is a factual question and as such is properly left to the jury whose finding will not be disturbed if there

---

[5] Defendant's requests read as follows:

"1. The mere fact that the plaintiff had been a seaman and member of the crew of the barge Pfeifer #2 prior to his injury does not entitle him to maintain this action against his employer.

2. It is the nature and character of the work being performed by the plaintiff at the time his injury was sustained which determines whether he has the right to maintain this law suit.

3. If you find that the work which the plaintiff was performing at the time he sustained his injury was not in connection with the furtherance of the navigation of the Pfeifer #2, your verdict must be for the defendant.

4. The evidence shows that at the time plaintiff sustained his injury he was in furtherance of the work of completing the laying of a deck on a raft. Unless you find that this work was being done by the plaintiff as a member of the crew of the Pfeifer #2 expressly for the purpose of furthering the repair of the Pfeifer #2 in order to enable it to continue in navigation, your verdict must be for the defendant."

is any evidence to support it. In my opinion there was sufficient evidence in this case to enable a jury to reasonably find that plaintiff was a seaman in the course of his employment at the time he was injured. See *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 (1958); *Butler* v. *Whiteman*, 356 U. S. 271 (1958); *Senko* v. *LaCrosse Dredging Co.*, 352 U. S. 370 (1957).

I would therefore reverse and remand for a new trial.

[fol. 84]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTIAN F. BRAEN, Plaintiff-Appellee,

v.

PFEIFER OIL TRANSPORTATION COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

JUDGMENT—January 23, 1959

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded with directions to dismiss the complaint in accordance with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 86] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 87]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—March 30, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.